Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To end discrimination by electric utilities in providing access to the interstate transmission grid, the Federal Energy Regulatory Commission (FERC) required each utility that owns or operates interstate transmission facilities to file an Open Access Transmission Tariff (OATT) providing, inter alia, that any curtailment of "firm" transmission service to wholesale customers will be proportional to curtailment of transmission to the utility's own retail customers. Respondent Northern States Power Companies (collectively, NSP) initially filed such an OATT but later filed proposed revisions giving preference to their own retail customers. FERC rejected the revisions and reiterated its requirement that the OATT include nondiscriminatory curtailment provisions. The Eighth Circuit reviewed and remanded this FERC action as beyond FERC's jurisdiction. The questions presented are:

> Whether FERC has jurisdiction under the Federal Power Act to regulate all transmission of electricity in interstate commerce, including interstate transmission for sales to retail customers.
>
> Whether FERC has jurisdiction to prevent undue discrimination in the transmission of electricity in interstate commerce by requiring that any curtailment of firm transmission service to wholesale customers be proportional to the curtailment of firm transmission for sales to the transmitting company's own retail customers.
>
> Whether the Eighth Circuit erred in holding that FERC lacks jurisdiction to regulate curtailments of firm transmission of electricity in interstate commerce because the FERC regulation might "encroach upon

the authority of the regulatory commissions of the states."

Whether, if the case now becomes moot because of the withdrawal of NSP's filing, this Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot.

PARTIES TO THE PROCEEDING

The parties before the court of appeals were:

Enron Power Marketing, Inc.
Commonwealth Edison Co.
Dairyland Power Cooperative
Federal Energy Regulatory Commission
Minnesota Department of Public Service
Missouri River Energy Services
Northern States Power Company (Minnesota)
Northern States Power Company (Wisconsin)
Southern Minnesota Municipal Power Agency
Wisconsin Electric Power Company
Wisconsin Public Power, Inc.

RULE 29.6 STATEMENT

Euron Corp. is the only publicly held company owning 10% or more of petitioner's stock. The following companies are the parent companies of petitioner:

Enron Corp.
Enron North America Corp.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Enron Power Marketing, Inc. (Enron) respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 176 F.3d 1090 and reprinted at Petitioner's Appendix (Pet. App.) 1a to 11a. The Orders of the Federal Energy Regulatory Commission are reported at 83 F.E.R.C. ¶ 61,098 (April 30, 1998), 83 F.E.R.C. ¶ 61,338 (June 29, 1998), and 84 F.E.R.C. ¶ 61,128 (July 31, 1998) and reprinted at Pet. App. 12a to 43a.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999 and amended on July 20, 1999. A timely petition for rehearing was denied on September 1, 1999. This petition is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The Supremacy Clause, Art. VI, cl. 2 of the Constitution, provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Sections 201, 205, 206, 211, 212, 213, and 313 of the Federal Power Act, 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 824l and 8251, are reprinted in the Appendix at Pet. App. 283a to 307a.

Sections 1, 4, and 5 of the Natural Gas Act, 15 U.S.C. §§ 717, 717c, and 717d, are reprinted in the Appendix at Pet. App. 308a to 313a.

Pertinent portions of FERC Order Nos. 888 and 888-A, [1991-96 Reg. Preambles], F.E.R.C. Stats. & Regs. ¶ 31,036 at 31,643 (1996) and [Regs. Preambles], III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997) (order on rehearing), are reprinted in the Appendix at Pet. App. 51a to 280a.

STATEMENT

The Eighth Circuit's decision denies FERC a large part of its jurisdiction over the transmission of electricity in interstate commerce. The decision conflicts, in three important ways, with decisions of this Court and the D.C.

Circuit. It also strips FERC of the authority to open the transmission grid fully to competition, thus perpetuating discrimination by electric utilities that own transmission facilities.

In its Order Nos. 888 and 888-A, FERC found that transmission-owning utilities have an incentive to discriminate—and have discriminated—against competing sellers of electricity who need transmission. Pet. App. 94a-97a, 126a-130a, 255a-256a. FERC therefore required each transmission-owning utility to adopt a pro forma Open Access Transmission Tariff (OATT) providing, inter alia, that when system constraints require curtailment of transmission, the utility will not discriminate in favor of its own retail customers and against generating and marketing companies that have purchased "firm" transmission service from the utility. Order No. 888 at 31,748-49; Pet. App. 168a-169a.

Respondent Northern States Power Companies (collectively, NSP) adopted the OATT, *see* Pet. App. 314a-318a, but later proposed to amend the curtailment provision to state that NSP would give preference, in any curtailment, to its own retail customers. *See, e.g.*, Pet. App. 319a-320a. FERC rejected the amendment and NSP sought Eighth Circuit review. In the decision from which review is sought, the Eighth Circuit directed FERC to allow the NSP amendment "so as to not encroach upon the authority of the regulatory commissions of the states [over NSP's retail transactions]." Pet. App. 11a.

A. Petitioner

Petitioner Enron is one of North America's largest marketers of power, competing with traditional utilities such as respondent NSP. To transmit the power it sells, Enron depends on nondiscriminatory access to the transmission systems of others. Enron buys *firm* transmission

service on NSP's system in order to fulfill its obligations to deliver firm power to customers, sometimes in competition with NSP. Currently, Enron has under contract on NSP's transmission system a reservation of approximately 100 megawatts of firm transmission for next summer's peak demand period. This reservation is essential to Enron's ability to compete in marketing power in the vicinity of NSP's system. The question whether NSP may degrade the firm service that it has sold to Enron and other competitors is therefore crucially important to Enron; consequently, Enron intervened in this case in opposition to NSP's proposed change of tariff.

B. Statutory Background

The Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, gives FERC jurisdiction over "the transmission of electric energy in interstate commerce" and "all facilities for such transmission." FPA § 201(b), 16 U.S.C. § 824(b). It also gives FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce." *Id.* These are distinct grants of jurisdiction, and FERC's jurisdiction over interstate "transmission" is not limited by the words "at wholesale." *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) (interpreting the parallel provisions of the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*).[1]

Section 205 of the FPA, 16 U.S.C. § 824d, bars any public utility, "with respect to any transmission or sale subject to the jurisdiction of the Commission," from grant[ing] any undue preference or advantage to any

[1] All of the provisions of the FPA pertinent to this case are materially identical to parallel provisions of the NGA. This Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

person or subject[ing] any person to any undue prejudice or disadvantage" and requires each utility to file tariffs setting forth its "practices." Section 206(a), 16 U.S.C. § 824e(a), commands that if FERC determines that a practice is "unjust, unreasonable, unduly discriminatory or preferential," FERC must cure the discrimination and "determine the just and reasonable . . . practice . . . to be thereafter observed and in force, and shall fix the same by order." As the D.C. Circuit has noted with respect to parallel provisions of the NGA, "The Act fairly bristles with concern for undue discrimination." *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (1987).

C. Regulatory Background

The FERC orders to NSP in this case are part of a more than twenty-year process by which Congress and FERC have helped introduce competition in the generation and sale of electric energy. Historically, electricity was provided by monopoly utilities that performed or contracted for all three key functions—generation, transmission, and delivery—and billed for electricity on a "bundled" basis. In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. §§ 2601 *et seq.*, which encouraged the creation of independent electric generating firms. *See* 16 U.S.C. §§ 2601, 2611. PURPA began a transformation of the industry: "In 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888, [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,036, at 31,643 (1996) [hereinafter Order No. 888], *clarified*, 76 F.E.R.C. ¶¶ 61,009, 61,347, *order on reh'g*, Order No. 888-A, III FERC Stats. & Regs. ¶ 31,048 (1997) [hereinafter Order

No. 888-A], *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *appeal pending sub nom. Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, *et al.* (D.C. Cir., argued Nov. 3, 1999) (quoting Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning Regulating the U.S. Electricity Industry*, 93 Colum. L. Rev. 1339, 1349 n.25 (1993)); Pet. App. 69a.

While electricity generation is now competitive, transmission facilities have generally continued to be owned and operated by the traditional utilities. Observing that there had been inadequate success in opening access to these facilities to new generating and marketing companies, Congress enacted the Energy Policy Act of 1992 (EPAct), 42 U.S.C. § 6807a, which gave FERC greater authority to order transmission-owning utilities to serve competing marketers of electricity. *See* Order No. 888 at 31,644-45; Pet. App. 72a-74a.

After an extensive rulemaking, FERC found in Order No. 888 that "transmission monopolists" have an inherent economic interest in "offer[ing] transmission [to competing sellers of electricity] on a basis that is inferior to that which they provide themselves." Pet. App. 126a. FERC explained that "by denying access or imposing discriminatory terms or conditions on transmission service [a transmission-owning utility] could foreclose other generators from competing." Pet. App. 70a (citation omitted). FERC also found that such monopolists were in fact discriminating; that such discrimination "will increase as competitive pressures continue to grow"; and that it was FERC's "duty to eradicate unduly discriminatory practices." Pet. App. 127a.

To eliminate this discrimination, FERC required utilities to offer "comparable" transmission to all users of the

interstate grid. It directed each transmission-owning utility to adopt a pro forma Open Access Transmission Tariff that would offer use of its transmission system to competing wholesale users on the same basis on which the utility itself uses the system to transmit power to its own customers. Pet. App. 94a-97a, 155a-156a. FERC determined that "[a]n essential element of non-discriminatory transmission access is the right of transmission customers to reserve and purchase transmission service that is of the same quality as that used by the transmission provider in serving its wholesale . . . and retail [customers]," Pet. App. 164a, and that this is particularly essential in the provision of the highest quality of service that utilities offer: firm transmission. *Id.* On the point of particular importance to this case, the OATT provides that any "curtailment" of "firm" transmission for other users must be proportional to curtailments of the utility's own uses in connection with its retail sales: "Curtailments will be made on a nondiscriminatory basis . . . ." Pet. App. 173a.

The concept of "firm" service is central to service comparability and FERC's effort to promote competition. Customers needing a continuous, reliable supply of power at times of peak demand pay a substantial reservation charge for this highest quality of transmission service. In Order No. 888, FERC insisted that only a single class of transmission service be sold as firm. Pet. App. 164a-166a. FERC did this because different power suppliers, competing to be attractive to customers, must be able to offer the same degree of assurance of continuous, reliable delivery of power. For example, were transmitting utilities, such as NSP, permitted to curtail transmission for competing suppliers of electricity before curtailing their own uses, they alone would be in a position to offer consumers reliable, continuous electricity. That would perpetuate the discrimination that Order No. 888 sought to remedy. And

competitors such as Enron, deprived of firm service comparable to that enjoyed by the utility, would be reluctant to invest in the facilities necessary to compete with the utility.

During the rulemaking process, several commenters took the position that transmission-owning utilities *should* be allowed to favor their "native load" retail customers by giving them a more favorable curtailment priority than other users of firm service. *See* Order No. 888 at 31,748; Pet. App. 166a-167a. FERC expressly rejected these arguments in its order on rehearing (Order No. 888-A), explaining that "sufficient [alternative] safeguards have been established to protect native load" retail customers. Pet. App. 271a. FERC explained that (1) "the transmission provider is responsible for planning and maintaining sufficient transmission capacity to safely and reliably serve its native load," *id.*, and (2) "the transmission provider [is permitted] to reserve . . . sufficient capacity to serve native load." *Id.* FERC thus allows a transmission owner to hold off the market and reserve for itself whatever firm capacity it expects to need to serve its own retail customers. But once the utility chooses to sell firm capacity to wholesale transmission users, the pro rata curtailment rule requires it to treat those other firm service users no less favorably than it treats itself. Pet. App. 271a-273a. To do otherwise would validate the discriminatory practice of offering competing users of the system firm service that is actually non-firm.

Petitions for review of numerous aspects of Order Nos. 888 and 888-A are pending in the D.C. Circuit. *Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, *et al.* (D.C. Cir., argued Nov. 3, 1999). Neither NSP nor any other party sought D.C. Circuit review of the pro rata curtailment issue raised by this case.

D. FERC Proceedings on the NSP Filings

Respondent NSP serves retail electric customers with a bundled package of generation, transmission, and delivery services, and sells unbundled firm transmission-only service to competing users of the system such as petitioner Enron. In 1996, in compliance with Order Nos. 888 and 888-A, respondent NSP filed its pro forma OATT. As required, the OATT provided that NSP "will curtail [transmission] service to Network Customers and Transmission Customers taking Firm Point-To-Point Transmission Service on a basis comparable to the curtailment of service to [NSP's] Native Load Customers." Pet. App. 314a-315a.

However, NSP later made various filings seeking to amend its OATT to replace the OATT curtailment scheme with other procedures. Pet. App. 319a-320a. FERC rejected these proposed procedures as insufficiently defined and not shown to be equivalent or superior to the OATT procedures. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,098 (April 30, 1998); Pet. App. 23a-24a. NSP next sought "clarification" from FERC that NSP could follow a curtailment plan that treated its own retail customers more favorably than other firm service customers. FERC denied NSP's "clarification," ruling that this scheme was not consistent with Order No. 888 or the OATT. 83 F.E.R.C. ¶ 61,338 (June 29, 1998); Pet. App. 40a.

Finally, NSP broadened its attack: It sought clarification, rehearing, and a stay on the ground that FERC did not have jurisdiction to regulate the curtailment of transmission service when that service is bundled together with a sale of power to NSP's own retail customers. FERC denied NSP's request, holding that in mandating pro rata curtailment it had "not regulate[d] bundled retail sales, but . . . [had] require[d] that wholesale transmission users

be treated comparably to the transmission provider's native load customers . . . ." 84 F.E.R.C. ¶ 61,128 (July 31, 1998); Pet. App. 43a.

E. The Decision Below

NSP petitioned the court of appeals for review of FERC's orders denying NSP's request to amend its OATT so as to allow it to favor its own native retail customers in any curtailment of firm service. FERC responded that the Eighth Circuit lacked jurisdiction to review its orders because NSP's petition amounted to a collateral attack on Order Nos. 888 and 888-A. The Eighth Circuit rejected this defense. Pet. App. 3a-4a.

On the merits, NSP argued that FERC does not have jurisdiction under the FPA to require pro rata curtailment of transmission among wholesale and retail customers because Congress reserved to the states the power to regulate retail sales. FERC explained that its orders did not prescribe curtailment rules for retail sales; rather, as to curtailments, those orders merely required that utilities concededly subject to FERC's jurisdiction not discriminate against third parties in favor of their own uses of transmission to make retail sales. Citing *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976), FERC noted that its undisputed jurisdiction over interstate transmission in connection with wholesales of power gives it authority to protect purchasers of firm transmission service for wholesale power against discrimination in favor of the transmitting company's own uses of its system. FERC also pointed out that its orders left NSP and other utilities fully able to provide for their own native retail customers by reserving and holding off the market sufficient firm capacity to do so.

FERC, however, shied away from the argument that most squarely validates its orders below, but this argu-

ment was made to the court by petitioner Enron and others. Citing *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), Enron argued that FERC has statutory jurisdiction to regulate the interstate transmission of electric power, including its curtailment, regardless of whether that power is sold downstream at wholesale or retail. FERC chose not to make this argument, despite its earlier conclusions in Order No. 888 that its FPA jurisdiction over interstate transmission does not depend on whether the electricity is sold downstream at wholesale or retail. Order No. 888 at 31,781.[2]

The Eighth Circuit rejected FERC's argument, ignored Enron's argument, and vacated and remanded the FERC orders denying NSP's amendments to its OATT. Without responding to FERC's explanation that retail customers are fully protected by NSP's freedom to withhold from the market as much transmission capacity as NSP believes necessary to serve its native retail customers, the court accepted NSP's argument that pro rata curtailment of firm transmission "will detrimentally affect native/retail customers." Pet. App. 6a. The court also held that FERC lacks jurisdiction because of the "indirect effect of Order No. 888" on nonjurisdictional sales to retail customers. Pet. App. 11a.

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[2] In Order No. 888, FERC determined that, although its jurisdiction over interstate transmission was unqualified, it nevertheless was "not necessary" for it to apply its nondiscrimination rules and the OATT directly to transmission of electricity for retail sales. Order No. 888 at 31,699-70, 31,781. On rehearing, in Order No. 888-A, FERC explained that its historical practice of not regulating transmission for bundled retail sales was "not the result of a legal requirement, [but rather] the practical result of the way electricity has historically been bought and sold." Order No. 888-A at 30,339. Elsewhere in Order No. 888-A, however, FERC stated (inconsistently) that it does not have FPA jurisdiction over transmission bundled with retail sales. Pet. App. 266a.

The court accepted NSP's argument that "to comply with FERC's interpretation of Order No. 888, as requiring comparable and equal service to point-to-point wholesale customers, along with its native/retail consumers, would violate state regulatory laws." Pet. App. 9a. Finding that "NSP . . . is placed between the proverbial rock and hard place, and will in effect be in violation of either a state tariff or Order No. 888," Pet. App. 10a, the court directed FERC on remand to amend its orders "so as to not encroach upon the authority of the regulatory commissions of the states." Pet. App. 11a. Petitions for rehearing by FERC, Enron, and others were denied. Pet. App. 281a-282a.

F. Proceedings on Remand

On remand, as instructed by the court of appeals, FERC issued an order allowing NSP to amend its OATT so as to differentiate between the firm service that NSP provides itself and an inferior "firm" service that it offers to others, including competitors such as Enron, attempting to address this differential with an unspecified difference in price. Pet. App. 44a-50a. FERC's court-mandated order on remand thus would permit NSP to adopt curtailment policies that discriminate in favor of NSP's own uses of its system to serve its own retail customers. Pet. App. 48a.

In response to FERC's order on remand, NSP filed a letter on November 19, 1999, seeking to withdraw its proposed OATT modification. Pet. App. 321a-325a. The withdrawal is effective December 6, 1999, unless an opposition is filed or FERC disapproves. *See* Withdrawal of Pleadings, 18 C.F.R. § 385.216 (1999). If and when it becomes effective, the withdrawal will erase the entire dispute and moot this case, leaving intact, however, the decision below seriously curtailing FERC's jurisdiction. In these circumstances it would be appropriate, and con-

sistent with this Court's practice, to vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way [to the Supreme Court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (vacatur appropriate where the party seeking relief from the judgment below did not cause the mootness by its voluntary action).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision, holding that FERC lacks jurisdiction to protect interstate transmission of electric energy against undue discrimination in favor of the transmitting utility's own native retail customers, conflicts with decisions of this Court and the D.C. Circuit. The conflict is important: The electric industry is by many measures the largest industry in the United States and one of the most fundamental to the entire U.S. economy. If the Eighth Circuit's decision stands, no regulatory authority, federal or state, will have the power to bar significant discrimination in this vital industry by owners of interstate transmission facilities,[3] or to assure that suppliers of elec-

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[3] Neither NSP nor the Eighth Circuit questioned the fact that all transmission service at issue in this case is in interstate commerce. It has long been established that because of the way electricity flows, any transmission on a system interconnected with systems in other states is interstate transmission. *See FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 208 (1964) (connection of California system with interstate grid).

tricity that are dependent on the transmission facilities of others will have a fair opportunity to compete.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS IN THREE IMPORTANT WAYS WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT.

The Eighth Circuit ruled that FERC's orders, which it described as "requir[ing] NSP, a public utility, to curtail electrical transmission to wholesale (point-to-point) customers on a comparable basis with its native/retail consumers," Pet. App. 4a-5a, are invalid because they "fall[] outside of the FPA's specific grant of authority to FERC." Pet. App. 11a. This ruling conflicts with decisions of this Court and the D.C. Circuit in three ways. (A) The "FPA's specific grant of authority" gives FERC jurisdiction to regulate *all* interstate transmission of electricity, including the interstate transmission of electricity as part of a sale to retail customers; this Court and the D.C. Circuit have squarely upheld FERC's parallel jurisdiction under the equivalent provision of the Natural Gas Act (NGA). *See, e.g., Louisiana Power & Light Co., supra*; *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992). (B) FERC's undisputed jurisdiction over interstate transmission for wholesale sales gives FERC clear authority to protect such transmission against undue discrimination, and for that purpose FERC could take into account the terms of transmissions for retail sales, even if it does not have direct jurisdiction over the latter. *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976). (C) FERC's actions here did not in fact encroach upon state regulatory authority, but if there were a federal-state regulatory conflict here, it would be the state laws that must yield. *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986).

A. The Eighth Circuit's Decision Conflicts with the Decision of this Court in *Louisiana Power & Light Co.*, and the Decision of the D.C. Circuit in *Mississippi River Transmission Corp.*

In *Louisiana Power & Light* (*LP&L*), a case strikingly similar to this one, this Court ruled that FERC's jurisdiction to remedy undue discrimination extends to all interstate transportation of natural gas, whether for sale at wholesale or retail. That decision should have controlled this case.

In *LP&L*, at a time of natural gas shortage, FERC's predecessor, the Federal Power Commission (FPC), had required every interstate natural gas pipeline to file a tariff setting forth procedures for curtailing gas deliveries to (i) wholesalers buying gas for distribtuion to ultimate consumers and (ii) industrial direct sales customers purchasing nonjurisdictional gas at retail for their own use. This Court said that the case "pose[d] the question whether FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale." 406 U.S. at 631. The Court held that the FPC has jurisdiction over the interstate transportation of gas for both kinds of sales and therefore the power to impose curtailment procedures that affect both. Although the present case presents the identical issue under the FPA, the Eighth Circuit's only reference to *LP&L* was a mysterious "*cf.*" citation. Pet. App. 11a. But the decision in *LP&L* rested on two grounds that are both directly on point here.

First, this Court ruled that FPC's jurisdiction over interstate *transportation* of gas is distinct from its jurisdiction over *sales* of gas, and only the latter is limited to "sales for resale." The pertinent language of section 1(b) of the NGA, 15 U.S.C. § 717(b), is as follows:

> The provisions of this chapter shall apply to [1] the transportation of natural gas in interstate commerce,

> [and] to [2] the sale in interstate commerce of natural gas for resale . . . but shall not apply to any other transportation or sale of natural gas . . . .

The Court held that each of clauses [1] and [2] "is an independent grant of jurisdiction and, though the Act's application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." 406 U.S. at 637. The corresponding portion of section 201(b) of the FPA, 16 U.S.C. § 824(b), contains the same two clauses and is otherwise identical except that the FPA refers to "transmission of electric energy" rather than "transportation of natural gas"; refers to the "sale of electric energy at wholesale in interstate commerce" rather than to the "sale in interstate commerce of natural fas for resale"; and refers to "electric energy" rather than "natural gas." The decision in *LP&L* is thus equally applicable to the parallel clauses in the FPA.

Second, the *LP&L* Court explained that the policy of the NGA required the FPC to have plenary jurisdiction over interstate transportation. The NGA bars utilities from granting "any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage," 15 U.S.C. § 717c(b), and it commands the agency, on complaint or *sua sponte*, to eliminate any unduly discriminatory practice. 15 U.S.C. § 717d(a). The Court noted that if the FPC's jurisdiction over transportation were limited to transportation for wholesale sales, no agency (federal or state) could effectively prevent the discrimination at issue: "Comprehensive and equitable curtailment plans for gas transported in interstate commerce . . . are practically beyond the competence of state regulatory agencies . . . ." 406 U.S. at 641.

The FPA bars undue discrimination in identical language, *see* 16 U.S.C. § 824(b), and in almost identical

language commands FERC to eliminate discrimination. *See* 16 U.S.C. § 824e(a). Like *LP&L*, this case involves discrimination among transmission uses, some supporting sales subject to the FPA and others not. As in *LP&L*, no agency could effectively police such discrimination if FERC's jurisdiction over interstate transmission were confined to transmission for wholesale sales. FERC must have, as this Court declared in *LP&L*, "broad powers to devise effective means to meet these [antidiscrimination] responsibilities." 406 U.S. at 642.[4]

The D.C. Circuit, in a decision with which the present case also squarely conflicts, ruled that "FERC is not barred from regulating a pipeline's interstate *transportation* of natural gas merely because the *sale* of the gas being transported is [at retail and therefore] not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute." *Mississippi River Transmission Corp.*, 969 F.2d at 1217 (emphasis added). The court offered the following additional justification for the rule:

> As far as the statute is concerned, there would have been no doubt of FERC's [NGA] section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. To accept MRT's position would therefore be tantamount to conferring on private parties the power to decide whether FERC could set the rate for interstate transportation.

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[4] In *LP&L*, the Court explained:

> [W]hen we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation.

406 U.S. at 641 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961)).

In light of the principle of interchangeability between FPA and NGA precedents, *see supra* note 1, the Eighth Circuit's decision is in square conflict with *LP&L* and *Mississippi River Transmission Corp.*[5]

B. The Eighth Circuit's Decision also Conflicts with the Decisions of the D.C. Circuit and this Court in the *Conway Case*.

Starting with the erroneous premise that FERC lacks jurisdiction over interstate transmission of electricity for bundled retail sales, the Eighth Circuit concluded that FERC has no power to protect other interstate transmissions—over which FERC undisputedly does have jurisdiction—from undue discrimination by requiring pro rata curtailment. This conclusion does not follow from the premise and squarely conflicts with other decisions of this Court and the D.C. Circuit. Both Courts have held that the agency may, in regulating jurisdictional transactions, take action that affects other transactions over which the agency otherwise has no regulatory jurisdiction.

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[5] The Eighth Circuit's decision also conflicts with other decisions of this Court and other circuits upholding FERC's jurisdiction to regulate transportation of natural gas regardless of whether it is sold downstream at wholesale or retail. *See, e.g., Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 523 (1947) (interruption of gas transportation is within FPC's jurisdiction, even though the gas is sold at retail to local users); *Fort Pierce Util. Auth. v. FPC*, 526 F.2d 993, 997 (5th Cir. 1976) ("[w]hile the Commission does not have the power to set rates for interstate gas which is not sold for resale, the Commission does have the power over allocations for such gas."); *see also Public Serv. Comm'n v. FERC*, 610 F.2d 439, 444 (6th Cir. 1979) (upholding FERC's jurisdiction to regulate transportation of gas from gathering line to local user); *Backus v. Panhandle E. Pipe Line Co.*, 558 F.2d 1373, 1375 (10th Cir. 1977) (holding that despite "fact that the gas which plaintiff receives comes from a gathering line and has not crossed a state line," the NGA gave FERC authority to regulate transportation of gas from gathering line to local user).

In *Conway Corp. v. FPC*, 510 F.2d 1264, 1271 (D.C. Cir. 1975), the question was "whether the FPC's authority, and responsibility, under §§ 205 and 206 [of the FPA], extend to claims of discrimination between rates for two classes of service, only one of which is subject to the jurisdiction of the Commission." At the time, the FPC's own position was that it did *not* have the authority, in regulating wholesale rates, to eliminate a discriminatory "squeeze" between those rates and retail rates subject only to state regulation. The D.C. Circuit disagreed:

> [A] common sense reading of the statutory language reveals no requirement that both rates involved in a pattern of discrimination fall within the jurisdiction of the Commission. . . . The FPC's position would leave a regulatory gap—no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates.

510 F.2d at 1271-72. This Court affirmed, *FPC v. Conway Corp.*, 426 U.S. 271, 272 (1976): "[We hold that the FPC has] jurisdiction to consider the allegations of the company's wholesale customers that the proposed wholesale rates, which are within the Commission's jurisdiction, are discriminatory and noncompetitive when considered in relation to the company's retail rates, which are not within the jurisdiction of the Commission."

This case is indistinguishable from *Conway*, and the decision below is in flat conflict with that decision. Even if FERC otherwise had no jurisdiction to alter the terms on which NSP transmits power for sale to its own retail customers, FERC clearly has jurisdiction to require that transmission for sale to other firm transmission customers be treated no less favorably.

C. The Eighth Circuit's Decision Also Conflicts with *Mississippi Power and Light*, *Nantahala*, and the Supremacy Clause.

The Eighth Circuit's central justification for ruling that FERC lacks the power to require NSP to curtail firm transmission on a pro rata basis was that such a FERC requirement might make it impossible for NSP to serve its native retail load as required by state law. Here again, the Eighth Circuit's premise was wrong. There was no conflict between FERC's requirement and state law. Under Order Nos. 888 and 888-A, transmission providers like NSP are (i) responsible for planning and maintaining sufficient transmission capacity to serve their retail customers safely and reliably, and (ii) expressly permitted to withhold from the market sufficient transmission capacity to serve their retail customers before offering firm transmission service to third parties. Pet. App. 153a-154a, 271a. What FERC sought to bar NSP from doing was selling "firm" transmission service to third parties such as petitioner and then, in a constraint situation, treating that service as less firm than transmission for NSP's own uses.

Even if there were indeed a conflict between federal and state statutory requirements here, the federal requirement would of course prevail. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-211 (1824). NSP is a public utility operating interstate transmission facilities. If a federal requirement of nondiscrimination among users of those facilities meant that NSP could not serve retail customers exactly as one of the states in which it operates may require it to do, then the state requirement would have to yield. *See Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 509 (1989) (when it is impossible to comply with both federal and state law, state law

is preempted); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (where a state regulation "stands as an obstacle to the accomplishment of the full purposes" and objectives of Congress, the state regulation is preempted).

In the rate-setting context, this Court has repeatedly held that federally established terms for wholesales of power must be taken as given—*i.e.*, treated as reasonable costs—in a state proceeding to establish a utility's retail rates. *See, e.g., Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986) (requirement that States respect FERC-filed wholesale terms is "a matter of enforcing the Supremacy Clause"). The same principle is equally applicable here: The federal requirement that transmission-owning utilities not discriminate in the operation of their interstate transmission facilities must be taken as given. If (contrary to the actual circumstances here) the effect of that requirement were to reduce a utility's ability to serve its own retail customers as directed by state law, the federal requirement would remain supreme. The Eighth Circuit's contrary decision that FERC's authority must be interpreted "so as to not encroach upon the authority of the regulatory commissions of the states" plainly conflicts with this principle.

II. THE EIGHTH CIRCUIT'S DECISION WOULD MAKE IT IMPOSSIBLE FOR FERC TO CARRY OUT ITS STATUTORY DUTIES TO REMEDY UNDUE DISCRIMINATION AND PROTECT THE SUPPLY OF ELECTRICITY; STATES CANNOT FILL THAT REGULATORY GAP.

The heart of the Eighth Circuit's decision is its determination that FERC lacks jurisdiction to impose a curtailment program that (the court believed) would have an

"indirect effect," Pet. App. 11a, on nonjurisdictional retail sales and would "encroach upon the authority of the regulatory commissions of the states." *Id.* The court's central premise—that at any intersection nonjurisdictional sales must remain unaffected and state regulatory authority must remain inviolate—would cripple FERC and create an unbridgeable regulatory gap.

The present case is a good example. Congress determined to encourage the creation of competing wholesale providers of electric power, and FERC determined that those firms must have nondiscriminatory access to the transmission grid, whose owners have an incentive to exclude competitors or give them inferior service. *See supra* pp. 5-8. FERC therefore ordered that NSP and other transmission-owning utilities may not, at a time of a system constraint requiring curtailment, favor transmission to their retail customers over other "firm" transmission customers. Such a rule is obviously essential: Without it, the transmission-owning utility will always be able to promise more reliable power delivery than its transmission-dependent competitor can offer. By holding that FERC lacks jurisdiction to impose such a rule, the Eighth Circuit has prevented FERC from eliminating this discrimination. That is a job no other governmental authority can do: No state commission has power to impose a nondiscrimination rule on interstate transmission of electricity that serves customers in several states. *Cf. LP&L*, 406 U.S. 621.

Curtailment, however, is by no means the only issue on which there is a threat of discrimination. Under Order Nos. 888 and 888-A, "comparability of access" also means that all transmission users must pay the facilities owner the same per-unit charge for the same quality of transmission service, *see* Pet. App. 222a-223a, and that they all should bear proportionate shares of the responsibility

for the "ancillary services" needed to maintain the stability and reliability of interconnected transmission services. Order No. 888 at 31,721. If FERC could not regulate these matters because they overlap with state-regulated sales to retail customers, the transmission-owning utility would be free either to deny service to third parties or charge more than the utility itself pays for comparable service. But under the Eighth Circuit decision, FERC would have no jurisdiction to require price equality, or proportionate sharing of costs of these transmissions, or nondiscrimination in most other aspects of interstate transmission service, because all of these requirements would affect the state-regulated terms and conditions of the utilities' retail tariffs.

The Eighth Circuit's decision would also interfere with FERC's efforts to insure reliable service. For example, in December 1998, FERC responded to serious threats to the operating integrity of the Eastern Interconnection (consisting of most of the electric systems east of the Rocky Mountains) by adopting modified Transmission Loading Relief (TLR) procedures to prevent transmission line overloads. *See North Am. Elec. Reliability Council*, 85 F.E.R.C. ¶ 61,353 (1998). The modified TLR procedures require a utility owning interstate transmission facilities to respond not only to constraints within its own system but to overload conditions anywhere in the Eastern Interconnection, and to do so without preferring transmission service to its own retail customers. *Id.* at 62,631. If the Eighth Circuit were right that FERC lacks jurisdiction to impose rules that may affect any transmission bundled with retail sales, FERC would be unable to protect the reliability of a regional grid from overloading caused by competing local preferences.

Virtually all of the terms and conditions for the transmission of electricity in interstate commerce potentially

"affect" the terms and conditions of the ultimate retail sale of that electricity. While the retail sale itself is subject only to state regulation, the Eighth Circuit's notion that upstream regulation by FERC cannot "encroach" upon downstream state requirements is clearly wrong. It is well established that otherwise valid FERC requirements are binding on state regulators. *See Nantahala*, 476 U.S. at 963-64, 66 (binding effect of FERC allocation of low-cost power). The same principle must be applicable to all of the aspects of interstate transmission that FERC alone can regulate: procedures for reserving and scheduling the use of transmission, transmission rates, curtailment priorities, rules for extending or terminating service, interconnection procedures, and many other transmission rules and practices addressed in FERC's Order Nos. 888 and 888-A. FERC regulation of all of these matters necessarily affects in some manner the downstream sales to retail customers that are regulated under state law. It is not an exaggeration to say that if the Eighth Circuit's "no encroachment on state regulation" principle were applied consistently, that application would wreak havoc upon interstate commerce in electricity.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted. If the case becomes moot through NSP's withdrawal of its filing, this Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot.

Respectfully submitted,

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November 30, 1999

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No. ——

IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 98-3000

NORTHERN STATES POWER COMPANY,
A MINNESOTA CORPORATION;
NORTHERN STATES POWER COMPANY,
A WISCONSIN CORPORATION
Petitioners,

MINNESOTA DEPARTMENT OF PUBLIC SERVICE
DAIRYLAND POWER COOPERATIVE,
Intervenor on Appeal,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

WISCONSIN ELECTRIC POWER COMPANY;
SOUTHERN MINNESOTA MUNICIPAL POWER AGENCY;
MISSOURI RIVER ENERGY SERVICES;
ENRON POWER MARKETING INCORPORATED
Intervenor on Appeal

Submitted March 8, 1999.

Decided May 14, 1999.
As Amended July 20, 1999.

Before FAGG, LAY, and WOLLMAN, Circuit Judges.

LAY, Circuit J.

On April 24, 1996, the Federal Energy Regulatory Commission ("FERC") promulgated Order No. 888[1] requiring "all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service." Order No. 888, 61 Fed.Reg. 21,540 (1996). FERC's stated goal was to encourage competition in the wholesale bulk power market place "and to bring more efficient, lower cost power to the Nation's electricity consumers." *Id.* Order No. 888 became final and effective on July 9, 1996. Thereafter, Northern States Power Company ("NSP") filed proposed revisions of its Open Access Transmission Tariff ("NSP Tariff")[2] to comply with the requirements of FERC Orders Nos. 888, 888-A, 888-B and 888-C and to file new tariffs that were consistent with the *pro forma* tariff of Order No. 888.

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[1] *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888 [Regs. Preambles Jan. 1991-June 1996], FERC Stats. & Regs. ¶31,036, clarified, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996), modified, Order No. 888-A [Regs. Preambles], III FERC Stats & Regs. ¶31,048 (1997), order on rehearing, Order No. 888-B, 81 FERC ¶61,248 (1997), on rehearing, Order No. 888-C, 82 FERC ¶61,046 (1998), petitions for review pending sub nom. *Transmission Access Policy Study Group, et al. v. FERC*, Nos. 97-1715, et al. (D.C.Cir., Mar. 30, 1998) (hereinafter collectively as "Orders").

[2] *Order accepting Open Access Transmission Compliance Tariff, Accepting in Part and Rejecting in Part Proposed Revisions, Instituting Investigation, Establishing Hearing Procedures and Refund Effective Date, and Consolidating Dockets*, 83 FERC ¶61,098 (April 30, 1998); *Order on Requests for Clarification*, 83 FERC ¶61,338 (June 29, 1998); *Order Denying Requests for Clarification, Rehearing and Stay*, 84 FERC ¶61,128 (July 31, 1998) (hereinafter collectively as "Curtailment Orders").

FERC rejected the proposed changes to the NSP Tariff's curtailment provisions on the grounds that: 1) NSP had defined curtailment priorities only through general references to unexplained procedures; 2) NSP had failed to demonstrate that the proposed terms were consistent with, or superior to, the *pro forma* tariff terms required by Order No. 888; and 3) NSP's description of the proposed procedures was misleading. Thereafter NSP filed this petition for review. On August 25, 1998, this court denied NSP's stay request and shortly thereafter denied FERC's motion to transfer the case to the United States Court of Appeals for the District of Columbia, or to hold the case in abeyance pending the omnibus appeal of FERC's Order No. 888 rule-making in the D.C. Circuit.

JURISDICTION

Initially, FERC has moved to dismiss these proceedings for lack of jurisdiction. It argues that the petitions for review filed by NSP constitute a collateral attack upon Order 888. In essence, NSP challenges FERC's regulation and possible curtailment of bundled retail electric sales[3], arguing that such actions are outside of FERC's jurisdiction. In its Curtailment Orders, both rejecting and accepting NSP's petitions, FERC failed to raise the issue of collateral attack. Nevertheless, FERC now asserts that NSP's proposed revisions were not timely and should have been made at the time Order No. 888 was being promulgated. It urges that the belated challenges by NSP should have been included in the rule-making proceedings pending before the United States Court of Appeals for the District of Columbia. We disagree.

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[3] NSP defines "bundled" electric sales to its retail customers as follows: " 'Bundled' service means the generation, transmission, and distribution of electricity together with all other services (meter reading, billing, equipment repair, supply curtailment) necessary to satisfy the customer's complete electric service needs." Petitioner's Brief at 2.

Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. §825l (b), provides that "[a]ny [aggrieved] party to a proceeding under [the FPA] ... may obtain a review of such order in the United States Court of Appeals for any circuit wherein ... the public utility to which the order relates is located or has its principal place of business." *Id.* The proceedings in this petition for review relate to the proposed tariffs filed by NSP pursuant to Order No. 888. Involved are the differing interpretations of the Orders as they affect the tariffs filed by NSP.

FERC asserts, as it must, that it has no intention of regulating retail sales to NSP customers, while also maintaining that its curtailment provisions apply only to wholesale sales, over which it has explicit jurisdiction. FERC concedes that its jurisdiction relates only to terms and conditions of electric transmission service provided by public utilities engaged in interstate commerce. See Respondent's Brief at 34. FERC's order requires that there be no discrimination in curtailment of electrical power when power constraints take place between the wholesale customer, who falls under FERC's jurisdiction, and the native/retail consumers, who are regulated solely by the state. *See Order Denying Requests for Clarification, Rehearing and Stay*, 84 FERC ¶61,128 (1998). NSP points out that under FERC's interpretation, the direct effect of FERC's curtailment orders will cause a nonjurisdictional disruption of service affecting NSP's native/retail consumers.

We conclude that these adverse arguments defeat FERC's jurisdictional objections and lay bare the distinction between the rule-making proceedings pending before the United States Court of Appeals for the District of Columbia and the present petition for review in this case. We therefore reject FERC's argument to dismiss for lack of jurisdiction.

THE MERITS

The fundamental issue to be decided on this appeal is whether FERC may, through its tariff orders, require NSP, a

public utility, to curtail electrical transmission to wholesale (point-to-point) customers on a comparable basis with its native/retail consumers when it experiences power constraints. FERC acknowledges that it cannot permissibly affect state regulation of retail rates and practices. FERC argues that it has simply required that, as to transmission curtailment, NSP may not discriminate against a third party in favor of its own native/retail consumers. Thus, it asserts that Order No. 888 makes clear that a transmission provider must curtail electrical transmission on a comparable and nondiscriminatory basis, including the provider's own use of the system. Under the tariff, public utilities will not be allowed to continue curtailment practices that give priority to bundled, native/retail load consumers over point-to-point users involved in interstate commerce. FERC suggests that there is no justiciable issue here. It reasoned:

> The *pro forma* tariff requires comparability of curtailments when consistent with Good Utility Practice. The Commission would not expect NSP Companies to violate Good Utility Practice when implementing curtailments. Further, the *pro forma* tariff allows the Transmission Provider the discretion to curtail firm transmission service when an emergency or other unforeseen condition impairs or degrades the reliability of its transmission system. Absent such system reliability concerns, however, NSP Companies must engage in a pro-rata curtailment.

Order on Requests for Clarification, 83 FERC ¶62,338 (1998).

However, the mere fact that the provider may exercise curtailments within its sole discretion is not the problem. The problem arises when NSP exercises its discretion to curtail service, but may then do so only by curtailing both wholesale and native/retail electric sales on an equal basis and not by giving preferential treatment to its native/retail load. Thus, NSP argues, when there exists a power constraint, by providing

curtailment to its native/retail consumers on a pro rata basis with wholesale users, NSP will be forced to provide interruptible service to its native/retail consumers. According to NSP, a pro rata curtailment will detrimentally affect native/retail consumers who have no other alternatives available to obtain electrical service. NSP urges that when wholesale (point-to-point) customers are curtailed in electrical transmission, the wholesale customer has alternative sources from which to obtain continuous electrical supply, through either the purchase of electricity from another provider, or via their own power generation facilities. Illustrative of this argument, NSP points to the circumstances involving Wisconsin Electric Power Company ("WEP"), an intervenor in this proceeding, and itself when WEP experienced curtailment of electrical transmission by NSP in the summer of 1998. WEP had to resort to alternative power, albeit at a higher price due to the emergency curtailment.[4] Unless we totally miscomprehend the arguments involved, we feel that FERC's observation that no inherent conflict exists between its mandates and practical application is viewed through an adversarial bias.

The more fundamental issue involved here, aside from the practicalities of the situation, is whether FERC has the jurisdiction to affect the curtailment practices of NSP when dealing with NSP's native/retail consumers. FERC argues that it does not, in any way, attempt to affect state regulation of retail rates and practices. At the same time, FERC points out that its jurisdiction over interstate sales is not made in a vacuum. As in *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C.Cir.1975), *aff'd sub nom., FPC v. Conway Corp.*, 426 U.S.

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[4] Wisconsin Electric Power Company argues in its intervenor brief that NSP should be required to furnish electrical transmission on a comparable basis with its native/retail customers so as to obviate Wisconsin Electric Power Company from having to black out its own retail customers. If such an argument assumes that NSP must black out its retail customers so that Wisconsin Electric Power Company's customers may have continuous service, we deem such argument unrealistic.

271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976), it argues the jurisdiction of the FPC is not "insulated from nonjurisdictional factors." *Id.* at 1272. In *Conway*, an electric utility was engaged in jurisdictional (wholesale) and nonjurisdictional (retail) sales. A portion of the utility's wholesale customers competed against it by reselling electricity purchased from the utility to other retail consumers. The wholesale customers alleged that the wholesale price was inflated in order to prevent them from competing for retail business. The Supreme Court held that the Federal Power Act authorized FERC to examine the entire factual context surrounding the wholesale rates, including facts related to the nonjurisdictional retail transactions. *See Conway*, 426 U.S. at 280, 96 S.Ct. 1999.

FERC relies upon the language of the United States Court of Appeals for the District of Columbia in *Conway* that FERC may take into consideration nonjurisdictional concerns "when germane to the meaningful execution of a jurisdictional function." *Conway*, 510 F.2d at 1272. We have no disagreement with these abstractions. However, one of the problems in the *Conway* case is the distinction pointed to by Judge Douglas Ginsburg in *Altamont Gas Transmission Company v. FERC*, 92 F.3d 1239 (1996). In *Altamont*, as the result of perceived discrimination against interstate gas shipments, FERC authorized a utility to begin building a new facility, but lowered the utility's allowed rate of return until the utility could demonstrate that its rates and policies no longer discriminated against interstate shippers. In taking note of the Supreme Court's delineation in *Conway*, Judge Ginsburg posited that jurisdictional implications of a nonjurisdictional transaction are germane only "[i]f the undue preference or discrimination is ... traceable to the level of the jurisdictional rate." *Id.* at 1247 (citing *Conway*, 426 U.S. at 277, 96 S.Ct. 1999). We have the same difficulty here, at least by analogy, that the alleged discrimination is traceable to the nonjurisdictional sale of bundled service provided by NSP to

the native/retail consumer rather than to the service provided to interstate customers.[5]

As NSP points out, it is given monopolistic control by the five states in which it operates. NSP is a vertically integrated electrical utility and provides electrical service throughout Minnesota, Michigan, North Dakota, South Dakota, and Wisconsin to an estimated two million retail customers. NSP argues that the exclusive grant given by these states to sell to native/retail consumers is on a *quid pro quo* basis; to wit, that NSP's native/retail consumers may depend on bundled sales without curtailment of service. In Order No. 888, FERC recognizes its own jurisdictional limits and states "[w]e reiterate that we are not requiring the transmission provider to unbundle transmission service to its retail/native load nor are we requiring that bundled retail service be taken under the terms of the Final Rule *pro forma* tariff." *Id.* at 21,604. This apparent concession is statutorily driven. Under 16 U.S.C. §824(a), Congress has expressly provided that "Federal regulation ... extend[s] only to those matters which are not subject to regulation by the States." *Id.* Section 824(b)(1) provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have

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[5] We think it can also be questioned whether the bundled electric sales, as defined n. 3 supra, is in the same class of service provided in the sale of electrical power to point-to-point customers. We find the difference in the products sold in itself justifies preferential treatment to native consumers beyond the reach of Tariff Order No. 888.

> jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Id.

NSP argues that to comply with FERC's interpretation of Order No. 888, as requiring comparable and equal service to point-to-point customers, along with its native/retail consumers, would violate state regulatory laws. For example, in the state of Minnesota NSP may not shed its retail load absent an emergency or when electric supply is limited or unavailable. *See Northern States Power Company*, MINNESOTA ELECTRIC RATE BOOK, GENERAL RULES AND REGULATIONS, Section 6, *Curtailment or Interruption of Service*, §6.2 (Add.41); Minn.Stat. §216B.37-.42. The state tariffs in the other states provide similar limitations.[6] Thus, NSP argues that if it is required to provide comparable transmission to both its retail and wholesale customers on a pro rata basis, that its native/retail consumers will face power outages contrary to the obligation set out in the state tariffs, in turn causing conflict with the long-held position that once a tariff has been approved, it has the force of law and is binding upon the parties. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951). NSP urges that state authority over its bundled service is jeopardized if FERC requires, under the guise of nondiscrimination, pro rata curtailment of the power supply to NSP's native/retail consumers.

As indicated, when the circumstances require curtailment in the transmission of electricity, most wholesale customers may

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[6] *See* Mich.Comp.Laws Chapter 460; N.D.Cent.Code Title 49; S.D. Codified Laws Title 49; Wisc. Stat. Chapter 196.

use alternative supplies from other utilities or generate power themselves, and can avoid power outages through such practice. The native/retail consumer, however, is unable to turn to alternative sources of supply. For these reasons, NSP urges that Good Utility Practice requires that wholesale transactions be curtailed before a utility is forced to shed its native/retail load. Thus, we find that NSP, through FERC's interpretation, is placed between the proverbial rock and hard place, and will in effect be in violation of either a state tariff or Order No. 888.

FERC responds simply that it does not operate in a vacuum and that it is not exercising any of its regulatory powers directly, but that through the enforcement of a federal tariff, there could be a lawful, indirect effect upon NSP's services to its native/retail consumers. NSP urges that this allows FERC to do indirectly what it is prohibited from doing directly, intercede in a matter reserved by Congress to the states. *See Altamont*, 92 F.3d at 1248. FERC's ultimate answer to all of this is that where there is a clash between its tariffs and the state law, the federal tariff must prevail under the Supremacy Clause. We cannot agree.

Before reviewing constitutional concerns relating to the Supremacy Clause, it is fundamental that this court must first satisfy itself that FERC has Congressional approval to regulate NSP in the manner now attempted. Congress has drawn a "bright line" between state and federal regulation. Here, there is no conflict between the state and federal regulatory schemes. In fact, FERC concedes that it has no jurisdiction whatsoever over the state's regulation of NSP's bundled retail sales activities. *See* Order No. 888-A, 62 Fed.Reg. 12,274, 12,299 (1997). Additionally, any reliance upon *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986), for the proposition that a state must defer to FERC's decision making for fear of running afoul of the Commerce Clause is also misplaced. In Nantahala, the Court applied the "fixed rate doctrine" under which interstate power rates filed with or fixed by FERC had to be given binding effect by state utility commissions in determining intrastate rates.

This is not an issue here. In *Nantahala*, the Court was dealing with hydroelectric power and facilities which obtained its power supply from the Tennessee Valley Authority, as well as navigable waters and dams placed thereon. In the present case, we have nothing comparable to the generation of electrical power that was involved in *Nantahala*. *Cf. FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). We think it obvious that the indirect effect of Order No. 888, as interpreted by the Commission, is an attempt to regulate curtailment of electrical power to NSP's native/retail consumers. Despite FERC's denial as to nonjurisdictional regulation, we find it has transgressed its Congressional authority which limits its jurisdiction to interstate transactions. As such, its attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC.

This cause is remanded to FERC to allow amendment to its curtailment orders, as now interpreted under Order No. 888, so as to not encroach upon the authority of the regulatory commissions of the states.

IT IS SO ORDERED.

APPENDIX B

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. OA97-25-000, OA97-606-000, ER98-1890-000, ER98-2060-000, and EL98-40-000

NORTHERN STATES POWER COMPANY (MINNESOTA) AND NORTHERN STATES POWER COMPANY (WISCONSIN)

Order Accepting Open Access Transmission Compliance Tariff, Accepting in Part and Rejecting in Part Proposed Revisions, Instituting Investigation, Establishing Hearing Procedures and Refund Effective Date, and Consolidating Dockets

(Issued April 30, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

This order addresses various filings made by Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (collectively, NSP Companies) concerning their open access transmission tariff and transmission rates. We will accept the open access tariff compliance filings and set one of the rate provisions for hearing, accept in part and reject in part the proposed revisions to the open access tariff, suspend the proposed revisions for five months and set them for hearing, institute an investigation into

NSP Companies' rates and establish a refund effective date, and consolidate these dockets for purposes of hearing and decision.

BACKGROUND

On October 11, 1996, NSP Companies filed in Docket No. OA97-25-000 an open access transmission tariff to comply with the Commission's order No. 888.[1] On December 24, 1996, NSP Companies filed a revised Attachment H to the open access transmission tariff—which addresses the annual transmission revenue requirement for network integration transmission service—to modify the methodology for calculating credits for customer-owned facilities.[2] On June 27, 1997, NSP Companies filed in Docket No. OA97-606-000 a revised open access transmission tariff to comply with the Commission's order No. 888-A.

On February 17, 1998, NSP Companies filed, in Docket No. ER98-1890-000, changes to the rates for firm point-to-point transmission service under their open access transmission tariff to reflect 1998 test year cost-of-service data. NSP Companies also proposed changes to the rates and terms and conditions for

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[1] See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 P 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Statutes and Regulations ¶31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶61,046 (1998).

FNNSP Companies had previously requested a waiver of the requirement to file an Order No. 888 compliance tariff, which we denied. Northern States Power Company, et al., 76 FERC ¶61,250, at ¶62,293 (1996).

[2] This revised filing was docketed in Docket No. OA97-25-000, and was also inadvertently docketed as the separate Docket No. OA97-162-000. Docket No. OA97-162-000 has been closed, and all matters relating to the revised Attachment H will be considered as part of Docket No. OA97-25-000.

various ancillary services, modifications to existing tariff terms and conditions, and changes to the rates applicable under long-term transmission agreements with certain municipal customers. NSP Companies request an effective date of May 1, 1998 for these changes.

On March 2, 1998, in Docket No. ER98-2060-000, NSP Companies filed proposed changes to the rates and terms of service for the network integration transmission provisions of the open access transmission tariff. The proposed changes would increase the annual transmission revenue requirement to reflect the 1998 test year cost-of-service data, change the mechanism for calculating the annual transmission revenue requirement to allow for annual updates starting May 1, 1999, and modify certain existing tariff terms and conditions. NSP Companies also request a May 1, 1998 effective date for these changes.

NOTICE OF FILING AND RESPONSES

Notice of NSP Companies' filing in Docket No. OA97-25-000 was published in the Federal Register, 61 Fed. Reg. 59,433 (1996), with comments, protests and interventions due on or before November 29, 1996. Motions to intervene were filed by Commonwealth Edison Company (Commonwealth Edison), Electric Clearinghouse, Inc. (ECI), and jointly by the Missouri Basin Municipal Power Agency and the Minnesota cities of Marshall, St. James, and Sauk Centre (Joint Municipals). A motion to intervene and protest was filed by the Coalition for a Competitive Electric Market (CCEM).

Notice of NSP Companies' filing in Docket No. OA97-606-000 was issued July 16, 1997, with comments, protests and interventions due on or before July 30, 1997.[3] Wisconsin

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[3] Notice of this filing was originally erroneously made in Docket No. ER97-3487-000, but was corrected with an errata issued July 17, 1997 in Docket No. OA97-606-000.

Municipal Intervenors (WMI), which consists of The Wisconsin Public Power Inc. SYSTEM and the municipalities of Bangor, Barron, Cornell, Medford, and Rice Lake, filed a motion to intervene on August 1, 1997.

Notice of NSP Companies' filing in Docket No. ER98-1890-000 was published in the Federal Register, 63 Fed. Reg. 10,599 (1998), with comments, protests and interventions due on or before March 20, 1998. A notice of intervention was filed by the Public Service Commission of Wisconsin (Wisconsin Commission). Motions to intervene were filed by Wisconsin Electric Power Company (WEPCO), Otter Tail Power Company (Otter Tail), Wisconsin Power & Light Company (WP&L), Minnesota Power & Light Company (Minnesota P&L), Minnesota Municipal Utilities Association (Minnesota Municipal), city of Kasson, Minnesota (Kasson), city of Buffalo, Minnesota (Buffalo), and WPS Energy Services, Inc. (WESI). Motions to intervene and protests were filed by Minnesota Wheeling Association (Minnesota Wheeling), Wisconsin Public Service Corporation and WPS Energy Services, Inc. (Wisconsin Public Service), the cities of Medford and Rice Lake, Wisconsin (Medford and Rice Lake), Commonwealth Edison, United Power Association (UPA), Enron Power Marketing, Inc. (Enron), Southern Minnesota Municipal Power Agency (Southern Minnesota), Dairyland Power Cooperative (Dairyland), Cooperative Power Association (CPA), Missouri Basin Municipal Power Agency and the cities of Hillsboro, Marshall, St. James and Sauk Centre (MBMPA), ECI, and Wisconsin Public Power Inc. (WPPI). Central Minnesota Municipal Power Agency (CMMPA) filed a motion to intervene out of time and protest. Some of the intervenors requested other forms of relief, including motions to reject the filing, requests for hearing and investigation, requests for summary disposition, and motions to consolidate Docket Nos. ER98-1890-000 and ER98-2060-000. NSP Companies filed a response to the motions to intervene and requests for relief.

Notice of NSP Companies' filing in Docket No. ER98-2060-000 was published in the Federal Register, 63 Fed. Reg. 12,087 (1998), with comments, protests and interventions due on or before March 20, 1998. Motions to intervene were filed by Wisconsin Public Service, Anoka Electric Cooperative (Anoka), WP&L, Minnesota Municipal, Otter Tail. Motions to intervene and protests were filed by Minnesota Wheeling, Medford and Rice Lake, National Rural Electric Cooperative Association (NRECA), UPA, Southern Minnesota, Dairyland, CPA, MBMPA, and WPPI. In addition, a motion to intervene out of time was filed by Northwestern Wisconsin Electric Company (Northwestern Wisconsin), and a motion to intervene out of time and protest was filed by CMMPA. Some of the intervenors requested other forms of relief, including motions to reject the filing, requests for hearing and investigation, requests for summary disposition, and motions to consolidate Docket Nos. ER98-1890-000 and ER98- 2060-000. NSP Companies filed a response to the motions to intervene and requests for relief.

DISCUSSION

A. Procedural Matters

The notice of intervention of the Wisconsin Commission, and the timely, unopposed motions to intervene of the persons listed above serve to make them parties to the respective proceedings in which they sought intervention. See 18 C.F.R. §385.214 (1997). We will grant the motions for leave to intervene out of time by WMI in Docket No. OA97-606-000, Northwestern Wisconsin in Docket No. ER98-2060-000, and CMMPA in Docket Nos. ER98-1890-000 and ER98-2060-000. The other requests for relief will be discussed below.

B. Open Access Transmission Tariff Compliance Filings in Docket Nos. OA97- 25-000, and OA97-606-000

1. Non-Rate Terms And Conditions

We find that the open access transmission tariffs filed by NSP Companies in Docket No. OA97-25-000 in order to comply with Order No. 888, and in Docket No. OA97-606-000 in order to comply with Order No. 888-A, contain non-rate terms and conditions that reflect the *pro forma* terms and conditions established in Order Nos. 888 and 888-A. Accordingly, we will accept these terms and conditions as of the effective dates discussed below.

CCEM in its protest requested several changes in NSP Companies' terms and conditions concerning specific procedures and forms for implementing the right of first refusal, reciprocity and creditworthiness procedures, the minimum term for firm point-to-point service, and deadlines for requesting short-term firm services. We will reject these proposed changes. As we said in our prior orders addressing the non-rate terms and conditions of open access compliance tariffs, we are concerned at this point only with whether the compliance tariff conforms with the *pro forma* tariff terms and conditions.[4] We find that NSP Companies' terms and conditions, in these respects, do conform. We will, consistent with our prior orders, grant the clarification requested by CCEM that a transmission customer need not identify the specific source that will provide ancillary services until the time for scheduling service. As we said before, however, should the customer fail to make the demonstration at the time of scheduling, it risks not being

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[4] See Atlantic City Electric Company, et al., 77 FERC ¶61,144, at pp. 61,535, 61,537 (1996), order on reh'g, 82 FERC ¶61,075 (1998) (Atlantic City Electric); See also Allegheny Power System, Inc., et al., 77 FERC ¶61,266 (1996), order on reh'g, 82 FERC ¶61,251 (1998) (APS I), and American Electric Power Service Corporation, et al., 78 FERC ¶61,070, order on reh'g, 82 FERC ¶61,204 (1998) (AEP).

allowed to schedule energy because of the lack of ancillary services.[5]

2. Rates and Rate Terms and Conditions

NSP Companies are considered to be "Group 1" public utilities under Order No. 888,[6] which means that they had an open access transmission tariff on file before the date of issuance of Order No. 888.[7] As such, NSP Companies were required to include in their Order No. 888 open access compliance tariff the same rates as were in the pre-Order No. 888 tariff, except where changes were necessitated by the revised non- rate terms and conditions.[8] We find, with one exception, that NSP Companies have included in their Order No. 888 compliance tariff the rates from their pre-Order No. 888 tariff without change.

The one change NSP Companies made to the rate provisions concerns crediting for customers that own transmission facilities. NSP Companies added a provision which (1) establishes a methodology for computing the credit NSP Companies will give a customer that owns transmission facilities that operate as part of the integrated grid, and (2) increases the network rate to reflect any such credits granted under the crediting methodology.[9] As initially tendered in

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[5] Atlantic City Electric, 77 FERC at p. 61,537.

[6] Order No. 888, FERC Statutes and Regulations at p. 31,964.

[7] *Id.* at p. 31,768. The NSP Companies' pre-Order No. 888 open access tariff was accepted subject to required modifications in Northern States Power Company, 74 FERC ¶61,142 (1996).

[8] Order No. 888, FERC Statutes and Regulations at p. 31,770. *See* also Allegheny Power System, Inc., et al., 80 FERC ¶61,143, at pp. 61,528-29 (1997), reh'g pending (APS II).

[9] For example, if NSP Companies negotiate a credit of $10,000/year in recognition of the transmission facilities provided by one customer, NSP Companies would increase the annual network revenue requirement by $10,000, thereby increasing each network customer's rate to reflect its load ratio share of the $10,000 payment.

Docket No. OA97-25-000, NSP Companies proposed to make a filing under Section 205 in order to implement the credit and the increase in the network rate. However, NSP Companies amended the originally filed tariff on December 24, 1996, to eliminate the filing requirement, i.e., to treat the surcharge as an automatic adjustment clause.

The proposed methodology for computing customer credits implements one of the pro forma tariff terms and conditions. Therefore, we find that the change NSP Companies made to their pre-Order No. 888 rates was necessitated by Order No. 888, and we will accept it for filing. However, our preliminary review indicates that the proposed methodology has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, we will set this crediting methodology and rate revision, including the reasonableness of using an automatic adjustment clause, for hearing. Under Order No. 888, any rate change necessitated by Order No. 888, such as this one, was subject to a blanket suspension and is subject to refund.[10] The crediting mechanism hereby set for hearing encompasses the provision as contained in the filings in Docket Nos. OA97-25-000 and OA97- 606-000. As discussed further below, we will consolidate the hearing on this issue with the hearing on issues concerning customer credits that have been raised in Docket Nos. ER98-1890-000 and ER98-2060-000.

We will reject the protests of CCEM and ECI to the extent they protest aspects of NSP Companies' ancillary service rates that are unchanged from the pre-Order No. 888 rate. As we said in APS II, we will not set for investigation during the compliance process rates that have simply been carried over from a previous tariff and have already been determined to be not unjust, unreasonable, or unduly discriminatory.[11] We will also reject CCEM's proposal to add language concerning credits

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[10] Order No. 888, FERC Statutes and Regulations at p. 31,769.

[11] APS II, 80 FERC at p. 61,537.

for non-firm customers whose service is interrupted. We clarified the policy with respect to this issue in APS II and made it applicable to all transmission providers.[12] Accordingly, no further change is required.

3. Effective Dates For Open Access Compliance Tariffs

NSP Companies requested an effective date of October 11, 1996 for its Order No. 888 compliance tariff filing in Docket No. OA97-25-000, which was the date that it filed the tariff. We will, however, make that tariff effective July 9, 1996, the date on which all Order No. 888 compliance tariffs were to go into effect.[13] This will not affect any customer's bills because the basic rates are unchanged, but it will ensure that NSP's obligation to obtain transmission service under its *pro forma* tariff for its own unbundled transactions began on July 9, 1996.

NSP Companies requested an effective date of November 1, 1996, for the revision it filed on December 24, 1996 concerning crediting for transmission facilities as it applied to network integration customers. NSP Companies explain that that is the date that several customers commenced network integration service and that the revision benefits customers. We will grant waiver to permit this revision to become effective November 1, 1996.

NSP Companies requested an effective date of July 1, 1997, for their Order No. 888-A compliance filing in Docket No. OA97-606-000. We will, however, make the Order No. 888-A compliance filing effective May 13, 1997, which is the date that the changes required by Order No. 888-A became effective. [14]

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[12] APS II, 80 FERC at pp. 61,549-50.

[13] Order No. 888, FERC Statutes and Regulations at p. 31,769.

[14] *See* Order No. 888-A, FERC Statutes and Regulations at p. 30,500.

C. Docket Nos. ER98-1890-000 and ER98-2060-000

1. Non-Rate Terms and Conditions

In Docket Nos. ER98-1890-000 and ER98-2060-000, NSP Companies have made what we have identified as ten changes to the non-rate terms and conditions of their open access transmission tariff. In Docket No. ER98-1890-000, NSP Companies (1) revised Section 13.5 to limit their redispatch obligation to NSP resources "under its control"; (2) added a reference to "redispatch costs" in Section 16.1; (3) changed the word "schedule" to "request for service" in Section 18.4 dealing with the determination of ATC; (4) changed Schedule 2 to add limitations as to when NSP Companies will provide reactive supply service; (5) revised Schedules 5 and 6 to specify that customer-supplied operating reserves must be "acceptable to" NSP Companies; and (6) revised Sections 14.6 and 18.3 to establish earlier deadlines for reserving and scheduling nonfirm service. In Docket No. ER98-2060-000, NSP Companies (1) revised the definition of the customer's network load (Section 1.23) to include the "reserved capacity of the Network Customer's firm point-to-point Transmission Customers;" and (2) revised the definition for load ratio share (Section 1.17) to replace the transmission provider's "total system load" with its "Transmission System" load. With respect to all of these changes, NSP Companies have either not attempted to demonstrate how they are consistent with or superior to the pro forma tariff, or have totally failed to even identify the change made other than through redlining the revised page.

In New York State Electric & Gas Corporation, 78 FERC ¶61,114, at pp. 61,434-35 (1997), reh'g denied, 82 FERC ¶61,209 (1998), the Commission explained that it would reject proposed changes found in the red-lined version of a revised tariff but not otherwise identified or discussed in the filing, and changes that were identified, but with no demonstration that the changes were consistent with or superior to the *pro forma* tariff. We will continue to strictly place the burden on the filing utility to demonstrate that revised terms and conditions are consistent

with or superior to the *pro forma* tariff. Accordingly, we will reject NSP Companies' proposed changes that are listed in the preceding paragraph.

NSP Companies have made two revisions to non-rate terms and conditions where they have attempted to demonstrate why they are consistent with or superior to the *pro forma* tariff. First, in Docket No. ER98-1890-000, NSP Companies propose to eliminate Section 2.1, which deals with the initial allocation of available transmission capacity, because the time frame for requesting such an initial allocation has now expired by its own terms. We will accept this revision because NSP Companies have adequately explained how it is consistent with the *pro forma* tariff.

The second revision that NSP Companies have attempted to support involves the curtailment procedures in the *pro forma* tariff. In Docket No. ER98-1890-000, NSP Companies have revised the curtailment procedures in Sections 13.6 and 14.7 to provide that curtailments would be made in accordance with the Mid-Continent Area Power Pool (MAPP) Line Loading Relief procedure (LLR). NSP Companies state that, under the MAPP LLR, when a curtailment is required for a facility, a Power Transfer Distribution Factor (PTDF) is calculated for transactions utilizing the affected transmission facility. The PTDF is the percentage of each current transaction that flows over the facility, e.g., if 5 MW of a 100 MW schedule flows over the affected facility, its PTDF on that facility is 5%. NSP Companies state that, under the MAPP LLR, all schedules with a PTDF of 5% or higher are subject to curtailment under the LLR before all schedules with a PTDF less than 5%. NSP Companies' prepared direct testimony offers the following explanation of the MAPP LLR:

> Schedules are curtailed in priority order. All schedules with a PTDF greater than 5% in a priority group are curtailed before schedules are curtailed in the next higher priority

group. Within each priority group, schedules are currently curtailed on a pro-rata basis.[15] [emphasis added]

NSP Companies provide no description of "priority groups" and do not explain whether the phrase "schedules are currently curtailed" indicates that NSP Companies intend to adopt MAPP practices, as they change from time to time, without a filing with the Commission. NSP Companies' witness asserts, without elaboration, that the MAPP LLR is consistent with the *pro forma* tariff requirement that curtailments "be made on a non-discriminatory basis."

Several intervenors have protested this change in the curtailment provisions.[16] They explain that, under the MAPP LLR, there are 14 different priority groups which, among other things, establish different priorities for firm services based on factors such as the type of power sale that is being transmitted, e.g., short-term firm service would be curtailed before longer-term firm service. Intervenors complain that these curtailment priorities do not track the *pro forma* tariff curtailment priorities, and do not provide curtailment on a comparable, non-discriminatory basis.

We will reject NSP Companies' proposed revisions to the curtailment provisions. First, it is unacceptable to define tariff curtailment priorities through a general reference to a MAPP procedure that is unexplained in the tariff and that may change from time to time. The specific curtailment priorities must be delineated in the tariff and subject to change only by a filing with the Commission under Section 205.[17] Second, the Order

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[15] Prepared Direct Testimony of Mr. David B. Grover, Exh. No. ___ (NSP- 200(DBG)), at 5.

[16] Among those protesting this change is ECI, Enron, Commonwealth Edison, and Wisconsin Public Service

[17] This is consistent with the Commission's recent order finding that Western Resources, Inc.'s proposed tariff provisions did not adequately describe its proposed new curtailment terms. Coalition Against Private Tariffs, 83 FERC ¶61,015 (1998).

No. 888 requirement that tariff terms be demonstrated as consistent with or superior to the *pro forma* tariff is not met by NSP Companies' one sentence assertion that this is the case. Finally, NSP Companies' description of the MAPP LLR is severely misleading. Nothing in NSP Companies' description provides an appreciation of the number of curtailment priorities or the basis for the priority used under the MAPP LLR.

2. Rates and Rate Terms and Conditions

In Docket No. ER98-1890-000, NSP Companies propose to increase the rate for firm point- to-point service; to revise the ancillary service rates in its tariff in several respects, including the initiation of a reactive supply charge (there was no charge for this service in the present tariff); to reduce the energy deviation band for energy imbalance service from 4% to 1.5%; to tie the charge for energy imbalance deviations to data published by Continental Power Exchange (CPEX) concerning the rates negotiated by utilities using its brokering services;[18] and to add some ancillary service charges to bilateral agreements which presently do not include charges for these particular ancillary services. In Docket No. ER98-2060-000, NSP Companies proposed to increase the Annual Transmission Revenue Requirement (ATRR) for network service and to change the mechanism for calculating ATRR.[19]

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[18] While many transmission providers assess a penalty charge of 100 mills/kWh for energy imbalances outside the deviation band, NSP Companies' present tariff assesses a charge based on its own marginal energy costs. NSP Companies state that the present rate actually creates an incentive to under schedule when NSP's marginal energy costs are less then the prevailing market price for energy. NSP Companies propose to adopt the highest price reported by CPEX for the day on which the deviations occurred.

[19] NSP Companies have also identified revisions to four provisions of the *pro forma* tariff that are related to their proposed rate changes, and these will be accepted, subject to the outcome of the Commission's review of the rate proposals. These revisions are: (1) revised the definition of network load (Section 1.17) to eliminate references to a 12 month rolling average; (2)

A number of intervenors contend that NSP Companies' filings in Docket Nos. ER98-1890-000 and ER98-2060-000 should be rejected as deficient. They complain that certain aspects of the cost methods are not explained (e.g., how administrative and general expenses were functionalized to transmission) and that the data on various statements are not cross-referenced to the supporting statements. They also contend that the workpapers are not adequate. Finally, they note that NSP Companies have made a computational error in developing the unit charge.

Our review indicates that NSP Companies' submittals meet the minimum threshold filing requirements, and we will therefore not reject the filings as deficient. However, we will summarily direct NSP Companies to file revised rates to correct a computational error. As noted by the intervenors, and acknowledged by NSP Companies, NSP Companies made an error in transferring the demands developed on Statement BB (91,691 MW) to Statement BL (89,913 MW), where those demands are divided into the revenue requirement to develop the unit charge. Correction of this error will reduce the transmission rate by about 8%. NSP Companies have made similar errors in developing some of the ancillary service rates. Accordingly, although NSP Companies have submitted revised cost-of-service statements,[20] we will direct NSP Companies to also file revised rates to correct these computational errors based on the demand data reflected in its cost study within 30 days of the date of the order herein.

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revised the definition of the transmissionprovider's monthly transmission peak (Section 1.48) to clarify that the current definition ("maximum monthly usage") includes "all network and Firm Point-to-Point Transmission Service;" (3) defines the annual billing year to begin in May each year (Section 34.1); and (4) changes the network load calculation from a rolling 12 month average to single annual recalculation (Section 34.3.1).

[20] *See* NSP Companies' Response in Docket No. ER98-1890-000.

Our preliminary analysis of NSP Companies' proposed rate changes indicates that they have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, with the corrections made to the computational errors noted above, we will accept the proposed rates for filing, suspend them and make them effective subject to refund, and set them for hearing, as ordered below. We will consolidate for hearing all rate related issues in Docket Nos. ER98-1890- 000 and ER98-2060-000, and will also consolidate with this hearing the issues related to customer credits for transmission facilities as discussed above with respect to Docket Nos. OA97-25-000 and OA97-606-000.

In West Texas Utilities Company, 18 FERC ¶61,189 (1982), we explained that where our preliminary examination indicates that proposed rates may be unjust and unreasonable, but may not be substantially excessive, as defined in West Texas, we would generally impose a nominal suspension. Here, our examination suggests that the proposed rates may yield substantially excessive revenues. Therefore, we shall suspend the proposed rates, and the related changes to rate terms and conditions, for five months, to become effective, subject to refund, on October 1, 1998.

Because the ultimately approved rates in this docket may be lower than the last clean rate (i.e., the rates approved in Docket Nos. ER94-1090-000 and ER94-1113-000),[21] we will also institute an investigation of the proposed rates under Section 206 of the Federal Power Act, in Docket No. EL98-40-000, and establish a refund effective date.

In cases where, as here, the Commission institutes a Section 206 investigation on its own motion, Section 206(b) requires that the Commission establish a refund effective date that is no

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[21] The last clean rate is that last rate in effect not subject to any refund obligation. *See Federal Power Commission v. Sunray DX Oil Company*, 391 U.S. 9, 21-24 (1968).

earlier than 60 days after publication of notice of the Commission's investigation in the Federal Register, and no later than five months subsequent to the expiration of the 60- day period. In order to give maximum protection to consumers, and consistent with our precedent,[22] we will establish the refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of our initiation of the investigation in Docket No. EL98-40-000 is published in the Federal Register.

Section 206 also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate of when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in Docket No. EL98-40-000 in the event the presiding judge has not, by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or issuance of an initial decision.

D. Joint Transmission Arrangements

NSP Companies' filing in Docket No. ER98-2060-000 raises an issue with respect to certain joint transmission arrangements that warrants special procedures. Historically, there has been a close interdependence, for transmission purposes, among NSP Companies and neighboring transmission facility owners, which include Southern Municipal, Dairyland, CPA, UPA, and

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[22] *See*, e.g., Cambridge Electric Light Company, 75 FERC ¶61,177 (1996); Canal Electric Company, 46 FERC ¶61,153, reh'g denied, 47 FERC ¶61,275 (1989).

CMMPA. NSP Companies had entered into agreements with these neighboring facility owners, some dating as far back as the 1960's, related to joint planning and joint use of transmission facilities. Over the years, these joint transmission agreements have been the subject of considerable dispute, not only as to the compensation provisions, but as to the extent to which the other party was permitted to use NSP Companies' transmission system. In 1995 and 1996, pursuant to various settlement agreements,[23] these neighboring facility owners became network transmission customers under NSP Companies' open access tariff. As such, they qualified under Section 30.9 of the pro forma tariff for billing credits applicable to Network Customers that own transmission facilities that are integrated into the Transmission Provider's Transmission System.

In their filing in Docket No. ER98-2060-000, NSP Companies now contend that the crediting for facilities owned by these network customers is not working as envisioned.[24] NSP Companies state that, in retrospect, they do not believe that the Commission intended for the crediting provisions to apply in some of the circumstances presented under NSP Companies' historical joint transmission arrangements. They suggest that the crediting provision was intended to apply only to tariff customers that owned discrete facilities located within the NSP Companies control area. They assert that some of the utilities with whom they had joint transmission arrangements own extensive facilities, which in some instances result in customer credits that equal or exceed the network rate that would otherwise be billed. NSP Companies add that the application of the crediting provision in these circumstances

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[23] Some of these settlements were intended to gain the neighboring facilities owners' support for the NSP Companies' ultimately unsuccessful efforts to merge with Wisconsin Electric Power Company to form Primergy.

[24] NSP Companies' position with respect to customer credits is presented in the Prepared Direct Testimony of Mr. Anthony G. Shuster, Exh. No. << NSP-105 (AGS).

could arguably be interpreted to require them to pay these customers the difference, thereby allowing the customers to effectively collect transmission revenues from NSP Companies and other tariff customers, even though they have no transmission tariff on file with the Commission.

NSP Companies admit that they voluntarily entered into the network service agreements, but state that the concept has not operated as anticipated. They also assert that they are not trying to avoid any payments that the neighboring facilities owners may be due for NSP Companies' use of their facilities, but want to avoid cost-shifting and timing problems associated with the existing method of crediting for use of these facilities. NSP Companies' remedy, as proposed in Docket No. ER98-2060-000, is to revise Section 34.1 of their tariff to cap the credit at the amount of the charge for network service that would otherwise apply, i.e., credits may reduce the customer's bill to zero, but NSP would not be required to make payments to the customer if the credit exceeded the bill. NSP Companies also propose various revisions to the mechanism for calculating the credit. NSP Companies acknowledge that they are receptive to other solutions, and ask that the Commission provide some guidance on these issues.

The neighboring facilities owners protest NSP Companies' proposal. Southern Municipal argues that NSP Companies should not be surprised that they would be a net payer as a result of the crediting mechanism since it replaces a joint transmission agreement which assigned substantial cost responsibility to NSP Companies for the joint transmission system. Southern Municipal contends that data developed in support of the settlement clearly indicated that its credit was expected to exceed its bill and that NSP Companies would be making payments to Southern Municipal each month. Finally, Southern Municipal states that it is involved in continuing disputes about which facilities are eligible for credits, and upon the Commission's directive in response to its protests in other dockets, it has attempted to resolve these disputes through the ADR process under NSP's open access tariff. Southern

Municipal also contends that all affected parties have urged NSP Companies to convene joint Network Operating Committee meetings to reach a broad resolution of these issues, but that NSP Companies have resisted these efforts.

CMMPA supports Southern Municipal's comments. CMMPA also complains that the NSP Companies' proposal is at odds with a moratorium which fixes CMMPA's credit for three years. CPA/Dairyland and other intervenors challenge NSP Companies attempted reliance on the approach in the prior transmission agreements. CPA/Dairyland note that those earlier agreements required investment equalization and did not contemplate that the parties' benefits and burdens would be disproportionate. Finally, UPA argues that a regional tariff is preferable and should be pursued now. UPA also contends that NSP Companies' current proposal (which caps the credit at the amount of the network charges that would otherwise be billed) is an attempt by them to relitigate a fundamental term and condition of Order No. 888 that should be summarily rejected.

The Commission agrees with NSP Companies that Section 30.9 of the *pro forma* tariff was not intended to be the foundation for joint transmission arrangements. Clearly, the Commission did not expect that a customer facility which was integrated with the transmission provider's system would, at the same time, comprise part of the customer's own integrated transmission grid. Section 30.9 was not designed to provide the framework for the complicated arrangements necessary to operate joint transmission systems such as the case here. That said, it is also clear that NSP Companies created this untenable situation by negotiating settlements promising something that was not required under the *pro forma* tariff. We will reject the last sentence of NSP Companies' proposed revision to Section 34.1 of the tariff, which places a cap on customer credits, because NSP Companies have not demonstrated how that change is consistent with the negotiated settlements. We believe that this issue presents special circumstances, and is not an issue that can be resolved through litigation of the appropriate terms for NSP Companies' open access tariff. While the

intervenors should not be deprived of the benefits of their settlement bargains, those bargains also cannot be forced to fit into the *pro forma* tariff.

We will therefore sever from the rest of the hearing ordered herein the issue of appropriate compensation mechanisms for use of the transmission facilities encompassed by network service by NSP Companies to Southern Municipal, Dairyland, CPA, UPA, and CMMPA. Because all of the affected parties seem to recognize the desirability of a negotiated, regional solution, we will assign this severed issue to a settlement judge. We would expect that the settlement judge and the parties will search for a solution that takes into account the promises embodied in the prior settlements, and that resolves these matters jointly and comprehensively and without resort to bilateral negotiations that fail to reflect the joint operation of these transmission facilities. We will direct that the settlement judge report to us within 90 days from the date of this order, and if these efforts appear unsuccessful, we will consider other procedures.

E. WPPI's Request for Summary Disposition

WPPI is NSP Companies' customer under two bilateral transmission agreements: the long-term transmission agreement for deliveries to certain western Wisconsin cities (WTA), and the long-term transmission agreement for deliveries to eastern Wisconsin (ETA), both of which were negotiated in 1990. The WTA currently includes three ancillary services: scheduling, load following and energy deviations, while the ETA includes only scheduling. In Docket No. ER98-1890-000, NSP Companies propose to revise the transmission rates in each agreement to track the changes proposed for the tariff rates; to add a reactive supply charge to each agreement; and to revise the other ancillary service provisions in the WTA to track changes proposed for the tariff.

WPPI moves for summary disposition, asking that we rule that NSP Companies are prohibited by contract from seeking certain changes to the transmission agreements. WPPI argues

that while the WTA and ETA allow for changes to rates, NSP Companies do not have the right under those agreements to unilaterally change the non-rate terms and conditions. WPPI challenges specifically the addition of reactive supply charges for each agreement and the proposed revisions to the energy imbalance charges in the WTA. We will deny WPPI's request. WPPI's contention that charges for reactive power and the deviation band for energy imbalances are non-rate terms and conditions is without merit. How much WPPI will pay for reactive power is clearly a rate matter, and the sole purpose of an energy imbalance deviation band is to demarcate the point at which the price changes from energy returned in kind (inside the band) to a higher charge (outside the band). Also, WPPI is incorrect in its contention that, under the WTA, energy imbalance provisions are not covered under the provisions permitting unilateral rate changes because they are not contained in the exhibit listing rates. Section 7.04 of the WTA states:

> All compensation provisions under this Agreement are subject to unilateral rate change filings by NSP at any time under Section 205 of the Federal Power Act, and complaint filings by WPPI at any time under Section 206 of the Federal Power Act. NSP shall have the unilateral right, on any basis whatsoever, to make unilateral rate change filings for firm transmission services provided hereunder

Clearly, the location of the compensation provision—whether or not it is in the rate exhibit—does not affect NSP Companies' ability to file changes to any "compensation" provision. Finally, the absence of a reactive power charge in the WTA and ETA is not surprising because the rates were last revised to track NSP companies' pre-Order No. 888 tariff rates and that tariff did not include a rate for reactive power. WPPI may pursue at hearing the amount of credit it should receive, if any, for reactive supply provided by its generating units.

WPPI also argues that NSP Companies have eliminated provisions from the WTA and ETA dealing with revenue credits and credits for customer-owned transmission facilities contrary to agreements reached as part of the Primergy merger settlement. WPPI contends that these are also unilateral revisions to non- rate terms that are not permitted under the ETA and WTA. Contrary to WPPI's claim, NSP Companies have not proposed any revision to the WTA or ETA related to the revenue credits and customer-supplied transmission. Further, it does not appear that those settlement provisions were ever codified in the WTA and ETA. Accordingly, WPPI's request for summary disposition is denied.

The Commission orders:

(A) NSP Companies' open access transmission tariff filed in Docket No. OA97-25-000 is hereby accepted and set for hearing in part, as discussed in the body of this order, to be effective July 9, 1996.

(B) NSP Companies' open access transmission tariff revision to Attachment H filed on December 24, 1996, is hereby accepted and set for hearing, as discussed in the body of this order, to be effective November 1, 1996.

(C) NSP Companies' open access transmission tariff filed in Docket No. OA97-606-000 is hereby accepted and set for hearing in part, as discussed in the body of this order, to be effective May 13, 1997.

(D) NSP Companies' proposed revisions to their open access tariff made in Docket Nos. ER98-1890-000 and ER98-2060-000 are hereby accepted in part, rejected in part, and, as accepted, suspended for five months and made subject to refund, and set for hearing in part, as discussed in the body of this order, to become effective October 1, 1998.

(E) NSP Companies are hereby directed to submit amended rate sheets reflecting the corrected computational error, as discussed in the body of this order, within 30 days of the date of this order.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in the consolidated dockets concerning the justness and reasonableness of NSP Companies' proposed rates and rate terms, as discussed in the body of this order.

(G) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of practice and procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL98-40-000 concerning the justness and reasonableness of NSP Companies' rates and rate terms, as discussed in the body of this order.

(H) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding in Docket No. EL98-40-000.

(I) The refund effective date in Docket No. EL98-40-000, established pursuant to Section 206(b) of the Federal Power Act, will be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (H) above.

(J) Docket Nos. OA97-25-000, OA97-606-000, ER98-1890-000, ER98-2060-000, and EL98-40-000 are hereby consolidated for purposes of hearing and decision.

(K) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in these proceedings to be held within approximately 15 days of the date of this order, in a hearing

room of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(L) The presiding administrative law judge shall advise the Commission, no later than 15 days prior to the refund effective date established in Docket No. EL98-40-000, in the event that the presiding judge has not by that date certified to the Commission a settlement which, if accepted, would dispose of the proceeding or issued an initial decision, as to the status of the proceeding and a best estimate as to when the proceeding will be disposed of by the presiding judge.

(M) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.603 (1997), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within approximately 15 days of the date of issuance of this order, for the limited purpose of considering the issue severed from the hearing, as discussed in the body of this order. The designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable. The settlement judge will report to the Commission on the status of the negotiations and the prospects for settlement within 90 days of the date of this order.

(N) The motions to intervene out of time, motions to reject, and motions for summary disposition are disposed of as discussed in the body of this order.

(O) NSP Companies are hereby informed of the rate schedule designations shown on the Attachment to this order.

APPENDIX C

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. OA97-25-000, OA97-606-000, ER98-1890-000, ER98-2060-000, and EL98-40-000

NORTHERN STATES POWER COMPANY (MINNESOTA) AND NORTHERN STATES POWER COMPANY (WISCONSIN)

Order on Request for Clarification

(Issued June 29, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

On May 18, 1998, Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (collectively, NSP Companies) requested clarification of our April 30, 1998 order (April 30 Order) in this proceeding.[1] The requested clarification concerns our rejection of NSP Companies' proposed modification of their open access transmission tariff that was intended to revise the curtailment procedures to be in accordance with the Mid- Continent Area Power Pool (MAPP) Line Loading Relief (LLR) procedure.

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[1] Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin), 83 FERC ¶61,098 (1998).

Commonwealth Edison Company (Commonwealth Edison), Wisconsin Electric Power Company (WEPCO), and Electric Clearinghouse, Inc. (ECI) filed answers to NSP Companies' request. We will grant NSP Companies' requested clarification in part and deny it in part, as discussed below.

Our April 30 Order rejected NSP Companies' proposal to revise their open access transmission tariff curtailment provisions to reflect the MAPP LLR because the proposed curtailment procedure was not adequately explained in the tariff, and NSP Companies did not demonstrate that the revisions were consistent with or superior to the *pro forma* tariff.[2]

NSP Companies state in their request for clarification that they will make a compliance filing to return their tariff's curtailment provisions to the *pro forma* language, and that they are not asking the Commission to rule on the merits of the LLR.[3] NSP Companies assert, however, that using the *pro forma* language in their open access tariff subjects them to potentially conflicting obligations as between the tariff and the MAPP Agreement. NSP Companies, therefore, ask us to approve of several procedures they propose to implement to avoid conflicting obligations.

As a general matter, NSP Companies explain that the MAPP LLR procedures are required to ensure regional reliability. NSP Companies describe this procedure as follows:

Under MAPP requirements, if NSP or any other MAPP utility encounters a situation which demands loading relief for any of its transmission facilities, that entity has the right to

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[2] *Id.* at p. 61,469.

[3] NSP Companies state that they would rely on the outcome of the complaint case filed in *Commonwealth Edison Company v. Mid-Continent Area Power Pool*, Docket No. EL98-19-000 (*Commonwealth Edison v. MAPP*) for the merits of the LLR procedure. We will address Commonwealth Edison's complaint in a separate, future order.

invoke the MAPP LLR procedures. When a utility requests MAPP to invoke LLR, the MAPP Security Center gathers all schedules, including the schedules NSP has accepted under its open access Tariff, notes the priority of each under MAPP LLR and orders utilities, including NSP, to effect interruptions as required under LLR.[4]

NSP Companies state that they intend to continue to implement MAPP LLR requests to interrupt or curtail schedules, but will ensure that the curtailment priority assigned to all transactions under the NSP Companies' tariff is the priority required under the *pro forma* tariff. NSP Companies explain that the MAPP LLR has a number of curtailment categories for firm transactions, based upon the length of the transaction. However, they state that by directing MAPP to assign all of NSP Companies' firm tariff transactions, regardless of their duration, to the MAPP LLR highest firm priority group, NSP Companies can ensure that MAPP does not direct any curtailments that are inconsistent with NSP Companies' pro forma tariff. We find that this is reasonable and consistent with our April 30 Order.[5] Contrary to ECI's assertion, the procedure

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[4] NSP Companies Request at 4.

[5] We note that in the *Commonwealth Edison v. MAPP* proceeding, MAPP has filed a letter informing the Commission that effective June 2, 1998, all firm transactions under MAPP member tariffs are provided the same, and highest, curtailment priority under the MAPP LLR. ECI asserts there is a conflict created in that the MAPP letter referred to priority level 15 as the highest, and NSP Companies referred to priority level 14 as the highest. Although we do not know the reason for this discrepancy, our clarification is based on NSP Companies' representation that they will report all firm transactions at the "highest available priority," whatever that may be.

Commonwealth Edison's answer to NSP Companies' request states that it appreciates NSP Companies' implementation proposals, but asserts that other MAPP members' transmission customers will not benefit from this and that a solution involving all of MAPP is required. As Commonwealth Edison is concerned about the actions of transmission providers other than NSP Companies, its concern is more appropriately addressed in its pending complaint case.

proposed will result in curtailment priorities that are consistent with the *pro forma* tariff.

NSP Companies also explain that they, rather than MAPP, have the responsibility for ensuring that curtailment priorities for firm point-to-point transactions under NSP Companies' tariff are the same as the curtailment priorities for NSP Companies' network/native loads. Section 13.6 of the *pro forma* tariff requires (to the extent practicable and consistent with Good Utility Practice) that curtailments to firm point-to-point transactions, network customers, and native load be done on a comparable basis. NSP Companies state that, when MAPP orders LLR for a constrained facility over which power flows to network/native load and firm point-to-point customers, NSP Companies will redispatch the system in a manner that will maintain comparability. For example, NSP Companies state that when 50% of the load on a constrained interface is firm point-to-point transactions and 50% is network/native load, NSP Companies will redispatch their system to absorb half of the load reductions required to relieve the constraint. We find that this procedure is reasonable and comports with the comparability requirements of the pro forma tariff.[6]

Next, NSP Companies state that, in the situation where there is a need to reduce loads on facilities that are being used to serve both NSP Companies' network/native loads and NSP's firm point-to-point tariff customers, but NSP Companies have exhausted all network/native load generation redispatch options, they do not believe they are required to shed network/native load in order to preserve comparability with curtailments of firm point-to-point transmission provided under their tariff.

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[6] WEPCO asserts that, if NSP Companies can avoid shedding network/native load by redispatching, it is not effecting a proportional curtailment of load. We disagree. NSP Companies have committed to effect a proportional curtailment of load on the constrained facilities. Having taken this action, NSP Companies, like any other transmission user, have the option to continue to serve load using other resources or transmission paths, as long as those actions are otherwise consistent with the *pro forma* tariff.

NSP Companies argue that this procedure is fair because it sold transmission service "based on the assumption that curtailment of firm service and its subsequent forced redispatch is permitted."[7] NSP Companies add that MAPP uses a smaller Capacity Benefit Margin (CBM) than other regions, and therefore withholds less transmission capacity "for emergency uses," allowing for the calculation of a greater Available Transmission Capability (ATC) for firm transmission transactions as compared to other regions.

We cannot, based on the facts before us, grant clarification that it is acceptable for NSP Companies to curtail firm point-to-point transactions without directing pro-rata curtailments for its network/native load, because that procedure would not comport with the *pro forma* tariff.[8] The fact that NSP Companies expect that their tariff customers may have redispatch options in circumstances when NSP Companies do not is not a criterion under the *pro forma* tariff for disproportionate curtailments of firm point-to-point services. Also, the fact that NSP Companies may have granted requests for firm point-to-point service in the expectation that they would not be required to adhere to the *pro forma* tariff curtailment terms provides no basis to grant clarification that NSP Companies need not adhere to its tariff terms. Moreover, NSP Companies' suggestion that it is a practice of MAPP utilities to calculate ATC more expansively

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[7] NSP Companies Request, Affidavit of Terry L. Volkmann at 7.

[8] In Order Nos. 888 and 888-A, the Commission rejected the argument that native load should be protected from load shedding under pro rata curtailments. *See* Promoting Wholesale Competition Through Open Acess Non- Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶31,036, at pp. 31,748-49 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Statutes and Regulations ¶31,048, at pp. 30,278-79 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶61,046 (1998).

than other regions, also in the expectation that network/ native load transactions will have a higher curtailment priority than the firm point-to-point tariff transactions, is unsupported and unpersuasive.

Finally, NSP Companies assert that for them to shed load under certain curtailment circumstances may reduce system transfer stability, and they rely on this as an additional reason why they should not be required to do so.[9] This presents a different issue. The *pro forma* tariff requires comparability of curtailments when consistent with Good Utility Practice. The Commission would not expect NSP Companies to violate Good Utility Practice when implementing curtailments. Further, the *pro forma* tariff allows the Transmission Provider the discretion to curtail firm transmission service when an emergency or other unforeseen condition impairs or degrades the reliability of its transmission system. Absent such system reliability concerns, however, NSP Companies must engage in a pro-rata curtailment.

The Commission orders:

NSP Companies' request for clarification is hereby granted in part and denied in part, as discussed in the body of this order.

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[9] NSP Companies Request, Affidavit of Terry L. Volkman at 6.

APPENDIX D

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. OA97-25-003, OA97-606-003, ER98-1890-004, ER98-2060-004, and EL98-40-003

NORTHERN STATES POWER COMPANY (MINNESOTA) AND NORTHERN STATES POWER COMPANY (WISCONSIN)

Order Denying Requests for Clarification, Rehearing, and Stay

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(Issued July 31, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

On July 1, 1998, as supplemented July 21, 1998, Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (NSP) filed an "Emergency Request For Clarification, Or Rehearing And Conditional Motion For Stay" of the Commission's June 29, 1998 order in this proceeding. Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin), 83 FERC ¶61,338 (1998). The Commission's June 29 order made several clarifications in response to an NSP request, one of which was that it was not acceptable for NSP to implement transmission line loading relief by curtailing firm point-to-point transmission customers before network/native load customers.

NSP now argues that the Commission does not have jurisdiction over bundled retail service, and the Commission should clarify that the order was not intended to apply the tariff curtailment requirements to network service that NSP uses to serve bundled retail load. NSP asks that the Commission immediately stay the order if the curtailment provisions apply to network load.[1]

DISCUSSION

We deny NSP's requests for clarification, rehearing, and stay. The Commission's June 29 order was clear that NSP cannot give preferential treatment to its native load when curtailing transmission. The Commission does not regulate bundled retail sales, but the *pro forma* open access transmission tariff implemented by Order No. 888[2] does require that wholesale transmission users be treated comparably to the transmission provider's native load customers, including retail customers. See tariff Sections 13.6 and 1.19.

Finally, NSP has not shown that justice requires granting its stay request.

The Commission orders:

NSP's requests for clarification, rehearing, and stay are hereby denied.

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[1] NSP also asks us to clarify the curtailment priority of certain firm transmission agreements with Wisconsin Public Power, Inc. As our June 29 order did not address that issue, it is not an appropriate subject for clarification or rehearing of that order.

[2] *See* Promoting Wholesale Competition Through Open Acess Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶31,036, at pp. 31,748-49 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Statutes and Regulations ¶31,048 at pp. 30,278-79 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶61,248 (1997), order on reh'g, Order No.888-C, 82 FERC ¶61,046 (1998).

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hebert, Jr.

Docket No. 0A97–25-004, 0A97-606-004, ER98-1890-005, ER98-2060-005, EL98-40-004

NORTHERN STATES POWER COMPANY (MINNESOTA)

NORTHERN STATES POWER COMPANY (WISCONSIN)

ORDER ON REMAND

(Issued November 15, 1999)

On May 14, 1999, the United States Court of Appeals for the Eighth Circuit, in *Northern States Power Co., et al. v. FERC*, 176 F.3d 1090 (1999), reh'g denied (9/1/99) (*NSP*), instructed the Commission to allow amendment to its Northern States Power Company (NSP) curtailment orders, as now interpreted under Order No. 888, consistent with the Court's opinion.[3] In this order, we modify our prior orders to permit NSP's proposed curtailment procedures, but subject to NSP filing further revisions to its curtailment provisions to reflect the narrow circumstances addressed in the Court's order as well as revisions to NSP's rates for firm point-to-point transmission service to reflect the inferior quality of service provided to point-to-point customers compared to the service provided to native load customers.

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[3] 176 F.3d at 1096

Background

In Docket No. ER98-1890-000, the proceeding relevant to this order on remand, NSP proposed, among other things, to increase its rate for firm point-to-point transmission service and, as a separate matter (*i.e.*, unrelated to the revised rates), to revise the curtailment procedures in Sections 13.6 and 14.7 of its open access transmission tariff to provide that curtailments would be made in accordance with the Mid-Continent Area Power Pool (MAPP) Line Loading Relief procedure (LLR). The Commission rejected NSP's proposed revisions to the curtailment provisions because those revisions improperly defined tariff curtailment priorities through a general reference to a MAPP procedure (which the Commission found NSP to have described in a misleading manner) and were not demonstrated to be consistent with or superior to the pro forma tariff. The Commission accepted in part and rejected in part NSP's proposal, suspended its effectiveness for five months, to become effective October 1, 1998, subject to refund, and set certain matters for hearing.[4] Subsequently, in response to a request for clarification, the Commission rejected, as irreconcilable with Order No. 888, NSP's assertion that it is acceptable for NSP to curtail firm point-to-point transmission service without directing pro rata curtailments of transmission service for its network/native load. *Northern States Power Co.*, 83 FERC 61,098, *clarified*, 83 FERC 61,338, *reh'g, clarification and stay denied*, 84 FERC 61,128 (1998).

The Commission explained with respect to NSP's clarification request:

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[4] The Commission also instituted an investigation under section 206 of the Federal Power Act because the ultimately approved rates may be lower than the last clean rates. 83 FERC at 61,470-71. On April 28, 1999, the presiding administrative law judge certified an uncontested offer of settlement that is designed to resolve all remaining issues pending between NSP and the active parties (the curtailment issue is not part of the settlement offer). See 87 FERC 63,003 (1999). This certification is currently pending before the Commission.

For example, NSP Companies state that when 50% of the load on a constrained interface is firm point-to-point transactions and 50% is network/native load, NSP Companies will redispatch their system to absorb half of the load reductions required to relieve the constraint. We find that this procedure is reasonable and comports with the comparability requirements of *the pro forma tariff*.[5]

However, the Commission disagreed with NSP's argument that when NSP has exhausted all of its network/native load generation redispatch options (and the transmission constraint had not been fully relieved) it can direct the curtailment of firm point-to-point transactions without directing pro rata curtailments of transmission service for its network/native load. *Id.*

The Court, however, concluded as follows:

We think it obvious that the indirect effect of Order No. 888, as interpreted by the Commission, is an attempt to regulate curtailment of electrical power to NSP's native/retail consumers. Despite FERC's denial as to nonjurisdictional regulation, we find it has transgressed its Congressional authority which limits its jurisdiction to interstate transactions. As such, its attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC.[6]

The Court instructed the Commission to allow amendment to its NSP curtailment orders, as now interpreted under Order No. 888, consistent with the Court's opinion. [7]

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[5] 83 FERC 61,338 at 62,369 (footnote omitted).

[6] 176 F.3d at 1096.

[7] Id.

Discussion

The Court addressed NSP's concerns in the context of a narrowly circumscribed factual circumstance the implementation of curtailment over a transmission constraint after NSP has exhausted all of its network/native load generation redispatch options, but the firm point-to-point transmission customer still has options with which to avoid having to shed load.[8]

NSP itself has asserted (in response to the Commission's petitions for rehearing before the Court) that "this case is quite narrow."[9] It maintained to the Court that

[t]his case addressed the relatively rare circumstance in which generation redispatch is inadequate or unavailable to relieve the transmission constraint fully. The June 29 Curtailment Order clearly required NSP to curtail pro rata even if redispatch has been exhausted. In that circumstance, NSP would be required to curtail *electric power* by reducing service to native load customers on the constrained line, thereby causing blackouts. NSP stands ready under its tariffs to shed load in tandem with other transmission customers. Being forced under the Curtailment Orders to shed load, however, merely to preserve a wholesale transaction's economic expectancy when that customer has redispatch options that could be used to help solve the problem, goes too far.[10]

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[8] Id. at 1093.

[9] Response at 3 n.3.

[10] Response at 4. NSP also pointed to a recent Commission decision, in which the Commission stated:

[W]e emphasize that the pro forma tariff does not prescribe procedures for curtailing loads, whether wholesale or retail. Rather, it prescribes procedures for reducing transmission on a constrained transmission facility.

The Commission will permit NSP to amend its open access transmission tariff to reflect its proposed curtailment procedures that would be effective in such "rare circumstances." However, it grants that permission subject to NSP also filing further revisions to its curtailment provisions to reflect the circumstances addressed in the Court's order, *i.e.*, the implementation of curtailment over a transmission constraint after NSP has exhausted all of its network/native load generation redispatch options, and the firm point-to-point transmission customer whose firm service is being curtailed still has options with which to avoid having to shed load. Specifically, if NSP amends its open access transmission tariff to reflect its proposed curtailment procedures, NSP must also revise its tariff to:

(1) curtailment that does not reflect a pro rata approach, will follow to ensure that NSP has exhausted all of its redispatch options, including invoking all options to purchase power from other suppliers and to purchase emergency energy from neighboring utilities;

(2) specify a methodology that NSP will use to confirm that any firm point-to-point transmission customer that is curtailed in excess of its pro rata curtailment has redispatch or other options available at the time NSP determines, under the procedures in (1) above, that NSP has exhausted all of its redispatch options; and

(3) specify a method to compensate a firm point-to-point transmission customer for any redispatch costs the customer may incur to protect NSP's native load and network customers from *pro rata* curtailment, including the cost of

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Response at 10 (citing North American Electric Reliability Council, 88 FERC 61,046 at 61,124 (1999) (emphasis in original). According to NSP, "[t]his statement implies that FERC now intends 'curtailment' to be limited to redispatch, a positive development but a fundamental departure from the requirements in the Curtailment Orders." *Id.*

any transmission service (on the customer's system) that the customer would need to support its redispatch on behalf of NSP's native load and network customers.[11]

In addition, if NSP amends its tariff to reflect its proposed curtailment procedures, NSP must revise its rates for firm point-to-point transmission service effective October 1, 1998 (the date its rate revisions went into effect subject to refund) to recognize the inferior quality of that service compared to the service provided by NSP to its native load and network customers, and provide cost support for such rates consistent with section 35.13 of the Commission's regulations. *See* 18 C.F.R. 35.13 (1999).[12]

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[11] For example, assume that NSP must reduce the use of a transmission line by 100 MW at a time when NSP and a firm point-to-point transmission customer each account for 50 percent of the total use of the line. Under the pro forma tariff, NSP and its firm point-to-point customer each would reduce its use of the line by 50 MW. Assume that, after following the procedures in (1) above, NSP can only remove 25 MW through redispatch of its system, but as confirmed by the procedures in (2) above, the firm point-to-point customer has additional redispatch options beyond those needed for its 50 MW pro rata curtailment. If NSP curtails its own uses by 25 MW and curtails the firm point-to-point customer's use by 75 MW, the customer has provided 25 MW of redispatch service to NSP. NSP must compensate the firm point-to-point customer for this service just as it would for any other redispatch service offered voluntarily by other market participants.

[12] . The Commission notes that the issues in this case would likely not arise in the context of a one-service tariff, under which there would no longer be point-to-point and network services but only a capacity reservation type tariff (see, e.g., Capacity Reservation Open Access Transmission Tariffs, Notice Of Proposed Rulemaking, FERC Stats. & Regs. 32,519 (1996)). Similarly, the distinction between third-party and native load service would not arise under a tariff administered by a regional transmission organization, which, for example, manages congestion on a regional basis (see Regional Transmission Organizations, Notice Of Proposed Rulemaking, FERC Stats. & Regs. 32,541 (1999)).

The Commission orders:

NSP is hereby ordered, unless it chooses to withdraw its proposal to amend its tariff with respect to curtailment procedures, to file revised curtailment provisions and revised rates, as discussed in the body of this order, within 30 days of the date of this order.

By the Commission.

(SEAL)

/s/ David P. Boergers
DAVID P. BOERGERS
Secretary

APPENDIX F

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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61 F.R. 21540 (May 10, 1996) 18 CFR Parts 35 and 385

[Docket Nos. RM95-8-000 and RM94-7-001; Order No.888]

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

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Issued April 24, 1996.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing a Final Rule requiring all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. The Final Rule also permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and Federal Power Act section 211 transmission services. The Commission's goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.

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I. Introduction/Summary

Today the Commission issues three final, interrelated rules designed to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.[1] The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce. A second critical aspect of the rules is to address recovery of the transition costs of moving from a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced.

In the year since the proposed rules were issued,[2] the pace of competitive changes in the electric utility industry has accelerated. By March of last year, 38 public utilities had filed wholesale open access transmission tariffs with the Commission. Today, prodded by such competitive changes and

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[1] These rules are the rules on open access and stranded costs in the above dockets (FERC Stats. & Regs. 31,036), and an accompanying rule on Open Access Same-Time Information System and Standards of Conduct (OASIS Final Rule) (FERC Stats. & Regs. 31,037) being issued contemporaneously. The Commission also is issuing contemporaneously a notice of proposed rulemaking on capacity reservation open access transmission tariffs in Docket No. RM96-11-000, FERC Stats. & Regs. 32,517. These final rules and proposed rule are being published concurrently in the Federal Register.

[2] On March 29, 1995, the Commission issued two notices of proposed rulemaking concerning open access transmission and stranded cost recovery. Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 FR 17662 (April 7, 1995), FERC Stats. & Regs. 32,514 (1995). On December 13, 1995, the Commission issued a notice of proposed rulemaking on information systems. Real-Time Information Networks and Standards of Conduct, Notice of Proposed Rulemaking, 60 FR 66182 (December 21, 1995), FERC Stats. & Regs. 32,516 (1995).

encouraged by our proposed rules, 106 of the approximately 166 public utilities that own, control, or operate[3] transmission facilities used in interstate commerce have filed some form of wholesale open access tariff. In addition, since the time the proposed rules were issued, numerous state regulatory commissions have adopted or are actively evaluating retail customer choice programs or other utility restructuring alternatives. These events have been spurred by continuing pressures in the marketplace for changes in the way electricity is bought, sold, and transported. Increasingly, customers are demanding the benefits of competition in the growing electricity commodity market.

The Commission estimates the potential quantitative benefits from the Final Rule will be approximately $3.8 to $5.4 billion per year of cost savings, in addition to the non-quantifiable benefits that include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion. The continuing competitive changes in the industry and the prospect of these benefits to customers make it imperative that this Commission take the necessary steps within its jurisdiction to ensure that all wholesale buyers and sellers of electric energy can obtain non-discriminatory transmission access, that the transition to competition is orderly and fair, and that the integrity and reliability of our electricity infrastructure is maintained.

In this Rule, the Commission seeks to remedy both existing and future undue discrimination in the industry and realize the significant customer benefits that will come with open access. Indeed, it is our statutory obligation under sections 205 and 206

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[3]The Commission's notice of proposed rulemaking in the above dockets proposed to apply the proposed requirements to public utilities that own and/or control facilities used for the transmission of electric energy in interstate commerce. "Own and/or control" is intended to include public utilities that "operate" facilities used for the transmission of electric energy in interstate commerce. However, we have modified the Final Rule regulatory text to remove any ambiguity.

of the Federal Power Act (FPA) to remedy undue discrimination.

To do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others. If we do not take this step now, the result will be benefits to some customers at the expense of others. We have learned from our experience in the natural gas area the importance of addressing competitive transition issues early and with as much certainty to market participants as possible.

Accordingly, in this proceeding and in the accompanying proceeding on OASIS, the Commission, pursuant to its authorities under sections 205 and 206 of the FPA:

- Requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce
- To file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service;
- To take transmission service (including ancillary services) for their own new wholesale sales and purchases of electric energy under the open access tariffs;
- To develop and maintain a same-time information system that will give existing and potential transmission users the same access to transmission information that the public utility enjoys, and further requires public utilities to separate transmission from generation marketing functions and communications;
- Clarifies Federal/state jurisdiction over transmission in interstate commerce and local distribution and provides for deference to certain state recommendations; and

- Permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and FPA section 211 transmission services.

Open Access

The Final Rule requires public utilities to file a single open access tariff that offers both network, load-based service and point-to-point, contract-based service. The Rule contains a pro forma tariff that reflects modifications to the NOPR's proposed terms and conditions and also permits variations for regional practices. All public utilities subject to the Rule, including those that already have tariffs on file, will be required to make section 206 compliance filings to meet the new pro forma tariff non-price minimum terms and conditions of non-discriminatory transmission. Utilities may propose their own rates in a section 205 compliance filing.

The Rule provides that public utilities may seek a waiver of some or all of the requirements of the Final Rule. In addition, non-public utilities may seek a waiver of the tariff reciprocity provisions.

The Final Rule does not generically abrogate existing requirements contracts, but will permit customers and public utilities to seek modification, or termination, of certain existing requirements contracts on a case-by-case basis. As to coordination arrangements and contracts, the Rule finds that these arrangements and contracts may need to be modified to remove unduly discriminatory transmission access and/or pricing provisions. Such arrangements and agreements include power pool agreements, public utility holding company agreements, and certain bilateral coordination agreements. The Rule provides guidance and timelines for modifying unduly discriminatory coordination arrangements and contracts, and specifies when the members of such arrangements must begin to conduct trade with each other using the same open access tariff offered to others. The Rule also provides guidance

regarding the formation of independent system operators (ISOs).

The Rule does not require any form of corporate restructuring, but will accommodate voluntary restructuring that is consistent with the Rule's open access and comparability policies.

As discussed in the NOPR, not all owners or controllers of interstate transmission facilities are subject to the Commission's jurisdiction under sections 205 and 206 of the FPA and therefore are not subject to this Rule's open access requirements. Therefore, the Final Rule retains the proposed reciprocity provision in the pro forma tariff. Without such a provision, non- open access utilities could take advantage of the competitive opportunities of open access, while at the same time offering inferior access, or no access at all, over their own facilities. Thus, open access utilities would be unfairly burdened. We note that some non-jurisdictional utilities have expressed an interest in a mechanism for obtaining a Commission determination that their transmission tariffs satisfy the reciprocity provisions in the pro forma tariffs, and we provide such a mechanism in the Rule.

The Final Rule does not generically provide for market-based generation rates. Although the Rule codifies the Commission's prior decision that there is no generation dominance in new generating capacity, intervenors in cases may raise generation dominance issues related to new capacity. In addition, to obtain market-based rates for existing generation, we will continue to require public utilities to show, on a case-by-case basis, that there is no generation dominance in existing capacity. Further, in all market-based rate cases, we will continue to look at whether an applicant and its affiliates could erect other barriers to entry and whether there may be problems due to affiliate abuse or reciprocal dealing.

Finally, contemporaneously with this Rule the Commission issues an NOPR on capacity reservation tariffs as an alternative,

and perhaps superior, means of remedying undue discrimination.

Transmission/Local Distribution

The Rule clarifies the Commission's interpretation of the Federal/state jurisdictional boundaries over transmission and local distribution. While we reaffirm our conclusion that this Commission has exclusive jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities, we nevertheless recognize the very legitimate concerns of state regulatory authorities as they contemplate direct retail access or other state restructuring programs. Accordingly, we specify circumstances under which we will give deference to state recommendations. Although jurisdictional boundaries may shift as a result of restructuring programs in wholesale and retail markets, we do not believe this will change fundamental state regulatory authorities, including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories. We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies.

Stranded Costs

With regard to stranded costs, the Final Rule adopts the Commission's supplemental proposal. It will permit utilities to seek extra-contractual recovery of stranded costs associated with a limited set of existing (executed on or before July 11, 1994) wholesale requirements contracts and provides that the Commission will be the primary forum for utilities to seek recovery of stranded costs associated with retail-turned-wholesale transmission customers. It also will allow utilities to seek recovery of stranded costs caused by retail wheeling only in circumstances in which the state regulatory authority does not have authority to address retail stranded costs at the time the retail wheeling is required. The Rule retains the revenues lost

approach for calculating stranded costs and provides a formula for calculating such costs.

Environmental Issues

The Commission has prepared a Final Environmental Impact Statement (FEIS) evaluating the possible environmental consequences of changes in the bulk power marketplace expected to occur as a result of the open access requirements of this Final Rule. The FEIS focuses, as do most commenters, on possible increases in emissions of nitrogen oxides (NO_X) from certain fossil-fuel fired generators, which could affect air quality in the producing region and in areas to which these emissions may be carried.

In response to comments on the Draft EIS, the Commission performed numerous additional studies. The FEIS finds that the relative future competitiveness of coal and natural gas generation is the key variable affecting the impact of the Final Rule. If competitive conditions favor natural gas, the Rule is likely to lead to environmental benefits. Both EPA and the Commission staff believe this projected scenario is the more likely one. If competitive conditions favor coal, the Rule may lead to small negative environmental impacts. However, even using the most extreme, unlikely assumptions about the future of the industry, the negative consequences are not likely to occur until after the turn of the century. Because the impacts will remain modest at least until 2010, there is no need for an interim mitigation program. In addition, even if the data showed more significant negative consequences requiring mitigation, the Commission does not have the statutory authority under the Federal Power Act or the expertise to address this possible far-term problem. The Commission believes, however, that there is time for federal and state air quality authorities to address any potential adverse impact as part of a comprehensive NO_X regulatory program under the Clean Air Act.[4]

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[4] 42 U.S.C. 7401, et seq.

Despite our conclusions regarding the lack of environmental impacts expected to result from the Rule, the Commission has examined a wide variety of proposals for mitigating possible adverse effects. We share the view of most commenters that the preferred approach for mitigating increased NO_X emissions generally is a NO_X cap and trading regulatory program comparable to that developed by Congress to address sulfur dioxide emissions in the Clean Air Act Amendments of 1990.[5] The Commission has examined various means of establishing such a program, including use of existing federal authorities under the Clean Air Act, cooperative efforts by state and federal air quality regulators, and development of a new emissions regulatory program administered by the Commission under the Federal Power Act. The Commission has concluded that a NO_X regulatory program could best be developed and administered under the Clean Air Act, in cooperation with interested states, and offers to lend Commission support to that effort should it become necessary.

Conclusion

The Commission believes that the Final Rule will remedy undue discrimination in transmission services in interstate commerce and provide an orderly and fair transition to competitive bulk power markets.

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III. Background

In the NOPR, we set out a detailed statement of the events leading up to this rulemaking. We repeat that background here, updated to reflect what has happened since March 1995, and discuss why it is necessary to undertake regulatory reform in the electric industry at this time. We do so to provide the necessary backdrop to our action in adopting this Rule.

A. Structure of the Electric Industry at Enactment of Federal Power Act

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[5] 42 U.S.C.A. 7651b-e.

The Federal Power Act was enacted in an age of mostly self-sufficient, vertically integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as part of a bundled service (delivered electric energy) to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility's transmission system. Each system covered limited service areas. This structure of separate systems arose naturally due primarily to the cost and technological limitations on the distance over which electricity could be transmitted.

Through much of the 1960s, utilities were able to avoid price increases, but still achieve increased profits, because of substantial increases in scale economies, technological improvements, and only moderate increases in input prices.[6] Thus, there was no pressure on regulatory commissions to use regulation to affect the structure of the industry.[7]

B. Significant Changes in the Electric Industry

In the late 1960s and throughout the 1970s, a number of significant events occurred in the electric industry that changed the perceptions of utilities and began a shift to a more competitive marketplace for wholesale power.[8] This was the beginning of periods of rapid inflation, higher nominal interest

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[6] Paul L. Joskow, Inflation and Environmental Concern: Structural Change in the Process of Public Utility Regulation, 17 J. Law & Econ. 291, 312 (1974); see also Charles F. Phillips, Jr., The Regulation of Public Utilities 11 (1988).

[7] See Joskow, supra at 312; see also Phillips, supra at 12.

[8] See Joskow, supra at 312; see also Phillips, supra at 12-13.

rates, and higher electricity rates.[9] During this time, consumers became concerned about higher electricity rates and questioned any price increases filed by utilities.[10]

During this same time frame, the construction of nuclear and other capital-intensive baseload facilities--actively encouraged by federal and some state governments--contributed to the continuing cost increases and uncertainties in the industry.[11] These investments were made based on the assumptions that there would be steady increases in the demand for electricity and continued large increases in the price of oil.[12] However, due to conservation and economic downturns, the expected demand increases did not materialize. Load growth virtually disappeared in some areas, and many utilities unexpectedly found themselves with excess capacity.[13] In addition, by the 1980s, the oil cartel collapsed, with a resulting glut of low-priced oil.[14] At the same time, inflation substantially increased the costs of these large baseload generating plants.[15]Surging interest rates further increased the cost of the capital needed to finance and capitalize these projects and completion schedules

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[9] See Joskow, supra at 312-13; see also Phillips, supra at 13. The Arab oil embargo resulted in significantly higher oil prices through the 1970s. See Richard J. Pierce, Jr., The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U. Pa. L. Rev. 497, 501 (1984).

[10] See Joskow, supra at 313; see also Phillips, supra at 13.

[11] See generally Jersey Central Power & Light Company v. FERC, 810 F.2d 1168, 1171 (D.C. Cir. 1987).

[12] Id.

[13] See Pierce, supra at 503. By 1983, the Department of Energy had estimated that the sunk costs for canceled nuclear plants alone amounted to $10 billion. Id. at 498.

[14] Id.

[15] See Bernard S. Black & Richard J. Pierce, Jr., The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry, 93 Col. L. Rev. 1339, 1346 (1993) ("Actual costs of nuclear power plants vastly exceeded estimates, sometimes by as much as 1000%.").

were significantly extended by, in part, more stringent safety and environmental requirements.[16]

As a result, expensive large baseload plants for which there was little or no demand, came onto the market or were in the process of being constructed. Accordingly, between 1970 and 1985, average residential electricity prices more than tripled in nominal terms, and increased by 25% after adjusting for general inflation.[17] Moreover, average electricity prices for industrial customers more than quadrupled in nominal terms over the same period and increased 86% after adjusting for inflation.[18] The rapidly increasing rates for electric power during this period, together with the opportunities provided by the Public Utility Regulatory Policies Act of 1978 (PURPA) (discussed *infra*), also prompted some industrial customers to bypass utilities by constructing their own generation facilities. This further exacerbated rate increases for remaining customers--primarily residential and commercial customers.

Consumers responded to these "rate shocks" by exerting pressure on regulatory bodies to investigate the prudence of management decisions to build generating plants, especially when construction resulted in cost overruns, excess capacity, or

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[16] See Phillips, supra at 13. Fossil fuel-fired plants became subject to increased regulation as a result of the Clean Air Act of 1970, and its 1977 amendments. 42 U.S.C. 7401-7642. In 1971, nuclear plant licensing became subject to the environmental impact statement requirements of the National Environmental Policy Act of 1969. 42 U.S.C. 4332. Following the 1979 accident at the Three Mile Island nuclear plant, nuclear plants also became subject to additional safety regulations, resulting in higher costs. See Energy Information Administration, The Changing Structure of the Electric Power Industry 1970-1991 (March 1993) 35. Between 1976 and 1980, most states and many localities instituted laws governing power plant siting.

[17] Based on retail prices reported in Energy Information Administration (EIA), Monthly Energy Review, January 1995, Table 9.9 (Prices adjusted for inflation using the GDP Deflator (1987 = 100)).

[18] Id.

both. Between 1985 and 1992, writeoffs of nuclear power plants totalled $22.4 billion.[19] These writeoffs significantly reduced the earnings of the affected utilities.[20] Delays in obtaining rate increases to reflect the effects of inflation further reduced investor returns. Thus, many utilities became reluctant to commit capital to long-term construction decisions involving large scale generating plants.[21]

In addition to economic changes in the industry, significant technological changes in both generation and transmission have occurred since 1935. Through the 1960s, bigger was cheaper in the generation sector and the industry was able to capitalize on economies of scale to produce power at lower per-unit costs from larger and larger plants.[22] As a result, large utility companies that could finance and manage construction projects of larger scale had a price advantage over smaller utility companies and customers who might otherwise have considered building their own generating units. Scale economies encouraged power generation by large vertically-integrated utility companies that also transmitted and distributed power. Beginning in the 1970s, however, additional economies of scale in generation were no longer being achieved.[23] A significant factor was that larger generation units were found to need relatively greater maintenance and experience longer downtimes.[24] The electric industry faced the situation "where

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[19] See Black & Pierce, supra at 1346 (These writeoffs were "about 17% of the book value of total 1992 utility investment.").

[20] Id.

[21] Id. ("The high perceived risk of future disallowances reversed utilities' incentives to overinvest, and made utilities extremely reluctant to build new power plants.").

[22] See Preston Michie, Billing Credits for Conservation, Renewable, and Other Electric Power Resources: an Alternative to Marginal-Cost-Based Power Rates in the Pacific Northwest, 13 Environmental Law 963, 964-65 (1983).

[23] Id. at 965.

the price of each incremental unit of electric power exceeded the average cost."[25] Bigger was no longer better.

Further dictating against larger generation units were advances in technologies that allowed scale economies to be exploited by smaller size units, thereby allowing smaller new plants to be brought on line at costs below those of the large plants of the 1970s and earlier. Such new technologies include combined cycle units and conventional steam units that use circulating fluidized bed boilers.[26]

The combined cycle generating plants generally use natural gas as their primary fuel. This technology has been made possible by the development of more efficient gas turbines, shorter construction lead times, lower capital costs, increased reliability, and relatively minimal environmental impacts.[27] Similarly, the circulating fluidized bed combustion boilers, fueled by coal and other conventional fuels, provide a more efficient and less polluting resource.

Today, "the optimum size (of generation plants) has shifted from (more than 500 MW) (10-year lead time) to smaller units

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[24] Energy Information Administration, The Changing Structure of the Electric Power Industry 1970-1991 (March 1993) 37 ("As larger units were constructed, however, utilities discovered that downtime was as much as 5 times greater for units larger than 600 megawatts than for units in the 100-megawatt range.")

[25] Id.; see also George A. Perrault, Downsizing Generation: Utility Plans for the 1990s, Pub. Util. Fort. 15-16 (Sept. 27, 1990) ("The large base-load generating units that form the backbone of utility systems are almost totally absent from capacity plans for the 1990s.").

[26] "From 1982 through 1991, the average capacity of fluidized-bed units increased rapidly to 72 megawatts for 4 units in 1991. The average capacity for the 19 units planned to begin operating in 1992 through 1995 increases to 83 megawatts." Energy Information Administration, The Changing Structure of the Electric Power Industry 1970-1991 (March 1993) 38.

[27] See Charles E. Bayless, Less is More: Why Gas Turbines Will Transform Electric Utilities, Pub. Util. Fort. (Dec. 1, 1994) 21.

(one-year lead time) (in the 50- to 150-MW range)."[28] Indeed, smaller and more efficient gas-fired combined-cycle generation facilities can produce power on the grid at a cost ranging from 5 cents per kWh to less than 3 cents per kWh.[29] This is significantly less than the costs for large plants constructed and installed by utilities over the last decade, which were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.[30] Significant changes have also occurred in the transmission sector of the industry. Technological advances in transmission have made possible the economic transmission of electric power over long distances at higher voltages.[31] This has made it technically feasible for utilities with lower cost generation sources to reach previously isolated systems where customers had been captive to higher cost generation. In addition, the nature and magnitude of coordination transactions[32] have changed dramatically since

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[28] Id. at 24. See also Wallace E. Brand, Is Bigger Better? Market Power in Bulk Power Supply: From FDR to NOPR, Pub. Util. Fort. (Feb. 15, 1996) 23 at 25 (while the optimal baseload unit size is about 500 MW for coal-fired steam turbines, the optimal size for gas fired combined-cycle units is about 150 to 200 MW).

[29] FERC staff calculations based in part on combined-cycle plant cost data reported in 1994 FERC Form No. 1 for a sample of units placed in service during 1990-94. Costs vary with regional fuel and construction costs, among other reasons.

[30] Coal and Nuclear plant cost data reported in 1994 FERC Form No. 1 and the EIA report, Electric Plant Cost and Power Production Expenses 1991, 1993 DOEEIA-0455(91), for plants placed in service during 1986-94; see also The 1994 Electric Executives' Forum, Bakke (President and CEO of the AES Corporation), Pub. Util. Fort. (June 1, 1994) 45 ("New generation can be built at about 3 cents per kilowatt-hour (U.S. average). Old generation costs about twice that * * *").

[31] See Black & Pierce, supra at 1345 (In the late 1960s and 1970s, improved transmission efficiency and development of regional transmission networks "made it possible to build power plants up to 1000 miles from power users.").

[32] Coordination transactions are voluntary sales or exchanges of specialized electricity services that allow buyers to realize cost savings or

enactment of the FPA, allowing increased coordinated operations and reduced reserve margins. Substantial amounts of electricity now move between regions, as well as between utilities in the same region. Physically isolated systems have become a thing of the past.

C. The Public Utility Regulatory Policies Act and the Growth of Competition

In enacting PURPA,[33] Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole.[34] To lessen dependence on expensive foreign oil, avoid repetition of the 1977 natural gas shortage, and control consumer costs, Congress sought to encourage electric utilities to conserve oil and natural gas.[35] In particular, Congress sanctioned the development of alternative generation sources designated as "qualifying facilities" (QFs) as a means of reducing the demand for traditional fossil fuels.[36] PURPA

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reliability gains that are not attainable if they rely solely on their own resources. For sellers, these transactions provide opportunities to earn additional revenue, and to lower customer rates, from capacity that is temporarily excess to native load capacity requirements.

[33] Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

[34] See generally FERC v. Mississippi, 456 U.S. 742, 745-46 (1982).

[35] The Power Plant and Industrial Fuel Use Act of 1978. Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

[36] QFs include certain cogenerators and small power producers. PURPA also added sections 210, 211, and 212 to the FPA, providing the Commission with authority to approve applications for interconnections and, in limited circumstances, wheeling. However, under section 211, as enacted in PURPA, the Commission could approve an application for wheeling only if it found, inter alia, that the order "would reasonably preserve existing competitive relationships." Because of this and other limitations in sections

required utilities to purchase power from QFs at a price not to exceed the utility's avoided costs and to sell backup power to QFs.[37]

PURPA specifically set forth limitations on who, and what, could qualify as QFs. In addition to technological and size criteria, PURPA set limits on who could own QFs.[38] Notwithstanding these limitations, QFs proliferated. In 1989, there were 576 QF facilities. By 1993, there were more than 1,200 such facilities.[39] For the same time period, installed QF capacity increased from 27,429 megawatts to 47,774 megawatts.[40] The rapid expansion and performance of the QF industry demonstrated that traditional, vertically integrated public utilities need not be the only sources of reliable power.

During this period, the profile of generation investment began to change, and a market for non-traditional power supply beyond the purchases required by PURPA began to emerge. QFs were limited to cogenerators and small power producers.[41]

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211 and 212 as originally enacted, the provision was virtually ineffective. Only one section 211 order was ever issued pursuant to the original provision, and it was pursuant to a settlement. See Public Service Company of Oklahoma, 38 FERC 61,050 (1987). As discussed infra, section 211 was subsequently revised by the Energy Policy Act of 1992.

[37] 456 U.S. at 750. Congress recognized that encouragement was needed in part because utilities had been reluctant to purchase electric power from, and sell power to, nonutility generators. Id. at 750-51.

[38] For example, PURPA provided that a cogeneration facility or small power production facility could not be owned by a person primarily engaged in the generation or sale of electric power (other than from cogeneration or small power production facilities). See 16 U.S.C.

[39] Energy Information Administration, Electric Power Annual 1993 (December 1994) 124 (Table 77).

[40] Id. EIA data for 1989 through 1991 was for facilities of 5 megawatts or more and for 1992 and 1993 was for facilities of 1 megawatt or more. A comparison with Table 74 on page 121 for the years 1992 and 1993 reveals that this mixing of data bases is likely of minimal effect.

[41] Generally, the law has imposed an 80 MW cap on small power

However, other non-traditional power producers who could not meet the QF criteria began to build new capacity to compete in bulk power markets, without such PURPA benefits as the mandatory purchase requirements. These producers, known as independent power producers (IPPs), were predominantly single-asset generation companies that did not own any transmission or distribution facilities. While traditional utilities were generally reluctant at that time to invest in new generating facilities under cost of service regulation, utilities increasingly became interested in participating in this new generation sector. They organized affiliated power producers (APPs), with assets not included in utility rate base, and sought to sell power in their own service territories and the territories of other utilities. At the same time, power marketers arose. These entities--owning no transmission or generation--buy and sell power.[42]

There were two major impediments to the development of IPPs and APPs. First, the ownership restrictions of the Public Utility Holding Company Act (PUHCA)[43] severely inhibited these new entities from entering the generation business.[44]

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producers. A limited exception enacted in 1990 permitted small power facilities that could exceed 80 MW and still qualify as QFs under PURPA. This exception was limited to certain solar, wind, waste, and geothermal small power production facilities and only covered applications for certification of facilities as qualifying small power production facilities that were submitted no later than December 31, 1994 and for which construction commences no later than December 31, 1999. See Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, 104 Stat. 2834 (1990), amended, Pub. L. No. 102-46, 105 Stat. 249 (1991).

[42] The first power marketer in the electric industry was Citizens Energy Corporation. See Citizens Energy Corporation, 35 FERC 61,198 (1986). Power marketers take title to electric energy. Power brokers, on the other hand, do not take title and are limited to a matchmaking role.

[43] 15 U.S.C. 79 et seq.

[44] As discussed infra, Congress eventually provided a means to avoid the PUHCA restrictions by creating exempt wholesale generators (EWGs) in the Energy Policy Act.

Second, these entities needed transmission service in order to compete in electricity markets.

While the Commission had no authority to remove PUHCA restrictions,[45] it encouraged the development of IPPs and APPs, as well as emerging power marketers, by authorizing market-based rates for their power sales on a case- by-case basis and by encouraging more widely available transmission access. From 1989 through 1993, facilities owned by IPPs and other non-traditional generators (other than QFs) increased from 249 to 634 and their installed capacity increased from 9,216 megawatts to 13,004 megawatts.[46] Indeed, "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities."[47]

Market-based rates helped to develop competitive bulk power markets. A generating utility allowed to sell its power at market-based rates could move more quickly to take advantage of short-term or even long-term market opportunities than those laboring under traditional cost-of-service tariffs, which entail procedural delays in achieving tariff approvals and changes.

In approving these market-based rates, the Commission required, *inter alia*, that the seller and any of its affiliates lack market power or mitigate any market power that they may have possessed.[48] The major concern of the Commission was

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[45] The industry was successful to some extent in developing ownership structures that permitted such investment. See, e.g., Commonwealth Atlantic Limited Partnership, 51 FERC 61,368 at 62,240 and n.20 (1990).

[46] Energy Information Administration, Electric Power Annual 1993 (December 1994) 124 (Table 77).

[47] Black & Pierce, supra at 1349 n.25.

[48] See, e.g., Ocean State Power, 44 FERC 61,261 (1988); Commonwealth Atlantic Limited Partnership, 51 FERC 61,368 (1990); Citizens Power & Light Company, 48 FERC 61,210 (1989); Orange and Rockland Utilities, Inc., 42 FERC 61,012 (1988); Doswell Limited Partnership, 50 FERC 61,251 (1990) (Doswel); and Dartmouth Power Associates Limited Partnership, 53 FERC 61,117 (1990).

whether the seller or its affiliates could limit competition and thereby drive up prices. A key inquiry became whether the seller or its affiliates owned or controlled transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission service, could foreclose other generators from competing.[49] As we have previously explained:

> The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive *ownership* of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.[50]

As entry into wholesale power generation markets increased, the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important.[51] In addition, beginning in the late

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[49] See, e.g., Doswell, 50 FERC at 61,757.

[50] Citizens Power & Light Corporation, 48 FERC 61,210 at 61,777 (1989) (emphasis in original); see also Utah Power & Light Company, PacifiCorp and PC/UP&L Merging Corporation, 45 FERC 61,095 at 61,287-89 (1988), order on reh'g, 47 FERC 61,209, order on reh'g, 48 FERC 61,035 (1989), remanded in part sub nom. Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991), order on remand, 57 FERC 61,363 (1991).

[51] In earlier years, a few customers were able to obtain access as a result of litigation, beginning with the Supreme Court's decision in Otter Tail Power Company v. United States, 410 U.S. 366 (1973). Additionally, some customers gained access by virtue of Nuclear Regulatory Commission license conditions and voluntary preference power transmission arrangements associated with federal power marketing agencies. See, e.g., Consumers Power Company, 6 NRC 887, 1036-44 (1977) and The Toledo Edison Company and Cleveland Electric Illuminating Company, 10 NRC

1980s, in order to mitigate their market power to meet Commission conditions, public utilities seeking Commission approval of mergers or consolidations under section 203 of the FPA or Commission authorization for blanket approval of market-based rates for generation services under section 205 of the FPA, filed "open access" transmission tariffs of general applicability.[52] The Commission applied its market rate analysis to IOUs, as well as IPPs, APPs, and marketers, and allowed IOUs to sell at market-based rates only if they opened their transmission systems to competitors.[53] The Commission also approved proposed mergers on the condition that the merging companies remedy anticompetitive effects potentially caused by the merger by filing "open access" tariffs. These early "open access" tariffs required only that the companies provide point-to-point transmission services, which is a much narrower requirement than that being imposed in this Rule and did not require transmission owners to provide to others the same quality of service that they themselves enjoyed.

265, 327-34 (1979). See Florida Municipal Power Agency v. Florida Power and Light Company, 839 F. Supp. 1563 (M.D. Fla. 1993). See also Electricity Transmission: Realities, Theory and Policy Alternatives, The Transmission Task Force Report to the Commission, October 1989, 197.

[52] See, e.g., Public Service Company of Colorado, 59 FERC 61,311 (1992), reh'g denied, 62 FERC 61,013 (1993); Utah Power & Light Company, et al., Opinion No. 318, 45 FERC 61,095 (1988), order on reh'g, Opinion No. 318-A, 47 FERC 61,209 (1989), order on reh'g, Opinion No. 318-B, 48 FERC 61,035 (1989), aff'd in relevant part sub nom. Environmental Action Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991); Northeast Utilities Service Company (Public Service Company of New Hampshire), Opinion No. 364-A, 58 FERC 61,070, reh'g denied, Opinion No. 364-B, 59 FERC 61,042, order granting motion to vacate and dismissing request for rehearing, 59 FERC 61,089 (1992), affirmed in relevant part sub nom. Northeast Utilities Service Company v. FERC, 993 F.2d 937 (1st Cir. 1993).

[53] See, e.g., Public Service of Indiana, Inc., 51 FERC 61,367 (1990), reh'g denied, 52 FERC 61,260 (1990), appeal dismissed sub nom. Northern Indiana Public Service Company v. FERC, 954 F.2d 736 (D.C.Cir. 1992).

Following PURPA, the economic and technological changes in the transmission and generation sectors helped give impetus to the many new entrants in the generating markets who could sell electric energy profitably with smaller scale technology at a lower price than many utilities selling from their existing generation facilities at rates reflecting cost. However, it became increasingly clear that the potential consumer benefits that could be derived from these technological advances could be realized only if more efficient generating plants could obtain access to the regional transmission grids. Because many traditional vertically integrated utilities still did not provide open access to third parties and still favored their own generation if and when they provided transmission access to third parties, barriers continued to exist to cheaper, more efficient generation sources.

D. The Energy Policy Act

In response to the competitive developments following PURPA, and the fact that PUHCA and lack of transmission access remained major barriers to new generators, Congress enacted Title VII of the Energy Policy Act of 1992 (Energy Policy Act).[54] A goal of the Energy Policy Act was to promote greater competition in bulk power markets by encouraging new generation entrants, known as exempt wholesale generators (EWGs), and by expanding the Commission's authority under sections 211 and 212 of the FPA to approve applications for transmission services.[55]

An EWG is defined as

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[54] Pub. L. No. 102-486, 106 Stat. 2776 (1992), codified at, among other places, 15 U.S.C. 79z-5a and 16 U.S.C. 796 (22-25), 824j-l.

[55] See El Paso Electric Company and Central and South West Services Inc., 68 FERC 61,181 at 61,914 (1994) (CSW); see also Paul Kemezis, FERC's Competitive Muscle: The Comparability Standard, Electrical World 45 (Jan. 1995) ("In EPAct, Congress made it clear that the electric-power industry was to move toward a fully competitive market system, but left most of the implementation to FERC.").

> any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in [PUHCA] section 2(a)(11)(B), and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.[56]

If the Commission, upon an application, determines that a person is an EWG, that person will be exempt from PUHCA.[57] This provision removed a significant impediment to the development of IPPs and APPs by allowing them to develop projects as EWGs free from the strictures of PUHCA or the QF PURPA limitations.

While sections 211 and 212, as enacted by PURPA, were intended to provide greater access to the transmission grid, the limitations placed on these sections made them unusable in virtually all circumstances.[58] However, as amended by the Energy Policy Act, these sections now give the Commission broader authority to order transmitting utilities to provide wholesale transmission services, upon application, to any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale.

The Energy Policy Act also added section 213 to the FPA. Section 213(a) requires a transmitting utility that does not agree to provide wholesale transmission service in accordance with a good faith request to provide a written explanation of its proposed rates, terms, and conditions and its analysis of any physical or other constraints.[59] Section 213(b) required the

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[56] 15 U.S.C. 79z-5a.

[57] 15 U.S.C. 79z-5a(e).

[58] See supra note 36.

[59] See Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992, 58 FR 38964 (July 21, 1993), FERC Stats. & Regs.,

Commission to enact a rule requiring transmitting utilities to submit annual information concerning potentially available transmission capacity and known constraints.[60]

E. The Present Competitive Environment

Following the Energy Policy Act, the Commission established rules: (1) For certain generators to obtain EWG status and thus an exemption from PUHCA;[61] and (2) that required transmission information availability. The Commission also pursued a number of initiatives aimed at fostering the development of more competitive bulk power markets, including aggressive implementation of section 211, a new look at undue discrimination under the FPA, easing of market entry for sellers of generation from new facilities, and initiation of a number of industry-wide reforms. As stated by the Commission, in recognition of the Congressional goal in the Energy Policy Act of creating competitive bulk power markets:

Our goal is to facilitate the development of competitively priced generation supply options, and to ensure that wholesale

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Regulations Preambles 30,975 (1993) (Policy Statement Regarding Good Faith Requests for Transmission Services).

[60] See New Reporting Requirements Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibilities Under the Energy Policy Act of 1992, and Conforming and Other Changes to Form No. FERC-714, 58 FR 52420 (October 8, 1993), FERC Stats. & Regs., Regulations Preambles 30,980 (Order No. 558), reh'g denied, Order No. 558-A, 65 FERC 61,324 (1993), regulations modified, 59 FR 15333 (April 1, 1994), FERC Stats. & Regs., Regulations Preambles 30,993.

[61] See Order No. 550, Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, 58 FR 8897 (February 18, 1993), FERC Stats. & Regs., Regulations Preambles 30,964, order on reh'g, Order No. 550-A, 58 FR 21250 (April 20, 1993), FERC Stats. & Regs., Regulations Preambles 30,969 (1993). As recognized by Congress and the Commission, availability of transmission information is critical in developing competitive markets. See supra notes 59 and 60. This opened the "black box" of information that previously was available only to transmission owners.

purchasers of electric energy can reach alternative power suppliers and vice versa.[62]

1. Use of Sections 211 and 212 to Obtain Transmission Access

The Commission has aggressively implemented sections 211 and 212 of the FPA, as amended by the Energy Policy Act, in order to promote competitive markets.[63] When wheeling requests under sections 211 and 212 have been made, the Commission has required wheeling in almost all of the requests it has processed. To date, the Commission has issued orders (proposed or final) requiring wheeling in 12 of the 14 cases it has acted on.[64]

As a general matter, section 211 has permitted some inroads to be made by customers in obtaining transmission service from public utilities that historically have declined to provide access to their systems, or have offered service only on a discriminatory basis. Under section 211, the Commission has granted requests for the broader type of service that most utilities historically have refused to provide--network service. Although transmission owners have provided limited amounts of unbundled point-to-point transmission service, third-party customers have not been able to obtain the flexibility of service that transmission owners enjoy.

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[62] See Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, 59 FR 35274 (July 11, 1994), FERC Stats. & Regs., Proposed Regulations 32,507 at 32,866 (Stranded Cost NOPR); American Electric Power Service Corporation, 67 FERC 61,168, clarified, 67 FERC 61,317 (1994).

[63] 16 U.S.C.A. 824j-824k (West 1985 and Supp. 1994).

[64] See, e.g., final orders issued in City of Bedford, 68 FERC 61,003 (1994), reh'g denied, 73 FERC 61,322 (1995); Florida Municipal Power Agency v. Florida Power & Light Company, 67 FERC 61,167 (1994), order on reh'g, 74 FERC 61,006 (1996); Minnesota Municipal Power Agency, 68 FERC 61,060 (1994); and Tex-La Electric Cooperative of Texas, 69 FERC 61,269 (1994); see also Appendix A.

In *Florida Municipal*, a section 211 case, the Commission ordered "network," rather than the narrower "point-to-point," service.[65] Network service permits the applicant to fully integrate load and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources. At the same time, the Commission made the generic finding that the availability of transmission service will enhance competition in the market for power supplies and lead to lower costs for consumers. The Commission explained that as long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability, transmission service is in the public interest.[66]

As discussed *infra*, based on the mounting competitive pressures in the industry and rapidly evolving markets, we have concluded that section 211 alone is not enough to eliminate undue discrimination. The comments received on the proposed rules, discussed in detail *infra*, confirm this conclusion. The significant time delays involved in filing an individual service request for bilateral service under section 211 place the customer at a severe disadvantage compared to the transmission owner and can result in discriminatory treatment in the use of the transmission system. It is an inadequate procedural

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[65] See Florida Municipal Power Agency v. Florida Power & Light Company, 65 FERC 61,125, reh'g dismissed, 65 FERC 61,372 (1993), final order, 67 FERC 61,167 (1994), order on reh'g, 74 FERC 61,006 (1996). The Commission has "characterized point-to-point service as involving designated points of entry into and exit from the transmitting utility's system, with a designated amount of transfer capability at each point." El Paso Electric Company v. Southwestern Public Service Company, 68 FERC 61,182 at 61,926 n.9 (1994) (citing Entergy Services, Inc., 58 FERC 61,234 at 61,768 (1993), reh'g dismissed, 68 FERC 61,399 (1994)). Network service allows more flexibility by allowing a transmission customer to use the entire transmission network to provide generation service for specified resources and specified loads without having to pay multiple charges for each resource-load pairing.

[66] Florida Municipal, 67 FERC at 61,477.

substitute for readily available service under a filed non-discriminatory open access tariff. As the Commission noted in *Hermiston Generating Company*, "[t]he ability to spend time and resources litigating the rates, terms and conditions of transmission access is not equivalent to an enforceable voluntary offer to provide comparable service under known rates, terms and conditions."[67]

2. Commission's Comparability Standard

In the Spring of 1994, the Commission began to address the problem of the disparity in transmission service that utilities provided to third parties in comparison to their own uses of the transmission system. In the seminal case in this area, *American Electric Power Service Corporation (AEP)*, the company voluntarily proposed a tariff of general applicability that would offer firm, point-to-point transmission service for a minimum of one month.[68] The Commission accepted the proposed transmission tariff for filing and suspended its effectiveness for one day, subject to refund.[69] Rehearing requests challenged the Commission's summary approval of the restriction of service to point-to-point as being discriminatory and anticompetitive.[70] The rehearing requests argued that the tariff should be expanded to include network services such as those used by the transmission owner. On rehearing, the Commission announced a new standard for evaluating claims of undue discrimination.

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[67] 69 FERC 61,035 at 61,165 (1994), reh'g denied, 72 FERC 61,071 (1995); see also Southwest Regional Transmission Association, 69 FERC 61,100 at 61,398 (1994), order on compliance filing, 73 FERC 61,147 (1995) (SWRTA).

[68] 64 FERC 61,279 (1993), reh'g granted, 67 FERC 61,168, clarified, 67 FERC 61,317 (1994).

[69] The Commission explained that AEP could limit the service it was offering because it was "providing the service voluntarily under a tariff of general applicability." 64 FERC at 62,978.

[70] AEP, 67 FERC at 61,489.

The Commission found that a voluntarily offered, new open access transmission tariff that did not provide for services comparable to those that the transmission owner provided itself was unduly discriminatory and anticompetitive.[71] In reaching that conclusion, the Commission broadened its undue discrimination analysis (which traditionally had focused on the rates, terms, and conditions faced by similarly situated third-party customers) to include a focus on the rates, terms, and conditions of a utility's own uses of the transmission system:

> [A]n open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system.[72]

Refocusing the analysis was necessitated by the changing conditions in the electric utility industry, including the emergence of non-traditional suppliers and greater competition in bulk power markets. Because a transmission provider may use its system in different ways (*e.g.*, to integrate load and resources when serving retail native load, to make off-system sales or purchases, or to serve wholesale requirements customers), the Commission set for hearing the factual issues associated with identifying those uses, as well as any potential

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[71] With respect to anticompetitive effects, the Commission explained that it has "adhered to the Supreme Court's determination that the Commission's ' important and broad regulatory power * * * carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to sections 202 and 203, and under like directives contained in sections 205, 206 and 207.' Gulf States Utilities Company v. FPC, 411 U.S. 747, 758-59 (1972)." Id. at 61,490 (footnote omitted). The Commission reaffirmed that it would examine how best to fulfill this responsibility, as well as its responsibility to prevent undue discrimination, in light of the changing conditions in the electric utility industry. Id.

[72] Id. at 61,490.

impediments or consequences to providing comparable services to third parties.[73]

After *AEP*, the Commission applied this comparability standard to a proposed open access transmission tariff that was filed by Kansas City Power & Light Company (KCP&L) in support of a proposal to sell generation at market-based rates.[74] The Commission explained that, in light of *AEP*, the utility's proposed open access transmission tariff (which provided only for point-to-point service) did not adequately mitigate its transmission market power so as to justify allowing the requested market-based rates. KCP&L could charge market-based rates for sales only if it modified its proposed transmission tariff to reflect the *AEP* comparability standard.

Since then, the Commission has required comparable service in a variety of contexts, and has set for hearing the factual issues associated with comparable service. For example, the Commission found that market power can be adequately mitigated only if a merged company offers transmission services in accordance with the *AEP* comparability standard.[75] The Commission further held that, even if a merger does not result in an increase in market power, the merger would not be consistent with the public interest under section 203 of the FPA unless the merged company offers comparable transmission services, as defined in *AEP*.[76] The Commission therefore announced a transmission comparability requirement for all new mergers:

> Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling public interest considerations, coordination in the public interest

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[73] Id. at 61,490-91.

[74] See Kansas City Power & Light Company, 67 FERC 61,183 (1994), reh'g pending.

[75] E.g., CSW, supra, 68 FERC at 61,914.

[76] Id.

> can best be secured only if merging utilities offer comparable transmission services.[77]

In Heartland Energy Services, Inc.,[78] the Commission applied its comparability standard to an affiliated electric power marketer seeking blanket authorization to sell electricity at market-based rates. The Commission explained that

> for all future cases involving blanket approval of market-based rates an offer of comparable transmission services will be required before the Commission will be able to find that transmission market power has been adequately mitigated. In the context of an affiliated power marketer, this means that all of its affiliated utilities must have a comparable transmission tariff on file.[79]

The Commission also denied a request by a company affiliated with a transmission-owning utility seeking permission to sell power at market-based rates to a particular customer. The denial was without prejudice to refiling such a request in a new section 205 proceeding, but only after the affiliated transmission-owning utility filed a comparable transmission service tariff.[80] The Commission added that it will require comparability in any situation in which a seller seeking market-

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[77] Id. at 61,915 (footnote omitted).

[78] 68 FERC 61,223 (1994).

[79] Id. at 62,060. In InterCoast Power Marketing Company, 68 FERC 61,248, clarified, 68 FERC 61,324 (1994), the Commission rejected an affiliated marketer's proposal to sell at market rates without its affiliate utility offering comparable transmission services. The Commission stated that the only way to ensure that InterCoast does not have transmission market power is to require its affiliated public utility to offer comparable transmission services. See also LG&E Power Marketing Inc., 68 FERC 61,247 at 62,120-21 (1994). The Commission added that this is consistent with encouraging competitive bulk power markets as envisioned by the Energy Policy Act of 1992. Id. at 62,132.

[80] See Hermiston Generating Company, 69 FERC 61,035 at 61,164 (1994), reh'g pending. The Commission subsequently accepted the rates on a cost basis. See Letter Order dated November 10, 1994.

based rates is affiliated with an owner or controller of transmission facilities.[81]

The Commission has also stated that "it will henceforth apply the transmission comparability standard announced in the *AEP* case to all transmitting utility members of an RTG."[82]

The Commission further declared that comparable services must be provided through "open access" tariffs rather than only on a contract-by-contract basis:[T]ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available * * *. (In contrast), a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using the transmission for their own benefit. Moreover, the ability to execute separate transmission agreements with different but similarly situated customers is the ability to unduly discriminate among them. A tariff ensures against such discrimination in the RTG.[83]

Thus, the Commission required the RTGs to amend their bylaws to commit all transmitting utility members to offer comparable transmission services to other RTG members pursuant to a transmission tariff or tariffs.

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[81]Id. at 61,165.

[82] See SWRTA, 69 FERC at 61,397; see also PacifiCorp, the California Municipal Utilities Association, and the Independent Energy Producers (on behalf of Western Regional Transmission Association), 69 FERC 61,099, order on reh'g, 69 FERC 61,352 (1994), order on compliance filing, 71 FERC 61,158 (1995) (WRTA). An RTG is a regional transmission group. It is defined as "a voluntary organization of transmission owners, transmission users, and other entities interested in coordinating transmission planning (and expansion), operation and use on a regional (and inter-regional." Policy Statement Regarding Regional Transmission Groups, 58 FR 41626 (August 5, 1993), FERC Stats. & Regs., Regulations Preambles 30,976 at 30,870 n. 4 (RTG Policy Statement).

[83]SWRTA, 69 FERC at 61,398.

As discussed below, since the *AEP* comparability standard was announced, the Commission has set for hearing 44 open access tariffs to determine what constitutes comparable service. This number includes tariffs filed subsequent to the Open Access NOPR. All tariffs have now been made subject to the outcome of the Final Rule.

3. Lack of Market Power in New Generation

In 1994 in the *KCP&L* case, discussed in the prior section, the Commission continued to recognize that transmission remains a natural monopoly. However, it found that, in light of the industry and statutory changes that now allow ease of market entry, no wholesale seller of generation has market power in generation from new facilities.[84] In particular, the Commission explained that it had previously noted in *Entergy Services, Inc.* that

> there was significant evidence that non-traditional power project developers, including qualifying facilities and independent power projects, are becoming viable competitors in long-run markets.[85]

The Commission further explained that since *Entergy*, Congress had enacted the Energy Policy Act, which had lowered barriers to the entry of new suppliers by creating a new class of power suppliers--EWGs--that are exempt from the provisions of PUHCA.[86] The Commission concluded that, in considering market-based rate proposals for generation sales, it need only focus on market power in transmission, generation market power in short-run markets, and other barriers to entry.[87]

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[84]KCP&L, 67 FERC 61,183 (1994).

[85]Id. at 61,557 (citing Entergy Services, Inc., 58 FERC 61,234 at 61,756 and nn. 63 and 65 (Entergy)).

[86]Id. The Commission added that "after examining generation dominance in many different cases over the years, we have yet to find an instance of generation dominance in long-run bulk power markets." Id.

[87]Id.

4. Further Commission Action Addressing a More Competitive Electric Industry

To address the fact that the electric industry is becoming more competitive, and to remove barriers that might inhibit a more competitive industry, the Commission has initiated a number of proceedings: (1) Stranded Cost NOPR,[88] (2) Transmission Pricing Policy Statement,[89] (3) Pooling Notice of Inquiry,[90] (4) Regional Transmission Group (RTG) Policy Statement,[91] and (5) Notice of Inquiry on Merger Policy.[92]

In the Stranded Cost NOPR the Commission recognized that the trend toward greater transmission access and the transition to a fully competitive bulk power market could cause some utilities to incur stranded costs as wholesale requirements customers (or retail customers) use their supplier's transmission to purchase power elsewhere. As the Commission noted, a utility may have built facilities or entered into long-term fuel or purchased power supply contracts with the reasonable expectation that its customers would renew their contracts and would pay their share of long-term investments and other incurred costs. If the customer obtains another power supplier, the utility may have stranded costs. If the utility cannot locate an alternative buyer or somehow mitigate the stranded costs, the Commission explained that "the costs must be recovered from either the departing customer or the remaining customers or

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[88]FERC Stats. & Regs. 32,507 (1994).

[89]Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, 59 FR 55031 (November 3, 1994), FERC Stats. & Regs., Regulations Preambles 31,005 (Transmission Pricing Policy Statement).

[90]Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act, 59 FR 54851 (October 26, 1994), FERC Stats. & Regs., Notices 35,529 (1995) (Pooling Notice of Inquiry).

[91]FERC Stats. & Regs. 30,976 (RTG Policy Statement).

[92]FERC Stats. & Regs. 35,531 (1996).

borne by the utility's shareholders."[93] Accordingly, the Commission proposed to establish provisions concerning the recovery of wholesale and retail stranded costs by public utilities and transmitting utilities.

In the Transmission Pricing Policy Statement, the Commission announced a new policy providing greater flexibility in the pricing of transmission services provided by public utilities and transmitting utilities. The Commission traditionally had allowed only postage-stamp, contract-path pricing.[94] Under the new policy, we will permit a variety of proposals, including distance sensitive and flow-based pricing, which may be more suitable for competitive wholesale power markets.[95] The Commission explained that this "(g)reater pricing flexibility is appropriate in light of the significant competitive changes occurring in wholesale generation markets, and in light of our expanded wheeling authority under the Energy Policy Act of 1992."[96] However, the Commission explained that any new transmission pricing proposal must meet the Commission's *AEP* comparability standard. The

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[93]FERC Stats. & Regs. 32,507 at 32,864.

[94]Most transmission contracts set a single price for energy flow over a utility's transmission system. This single-price policy is called "postage stamp" pricing because the rate does not depend on how far the power moves within a company's transmission system. If power flows through several companies, traditional industry practice is to specify that power flows along a "contract path" consisting of the transmission-owning utilities between the ultimate receipt and delivery points. See Indiana Michigan Power Company, 64 FERC 61,184 at 62,545 (1993).

[95]Unlike with postage stamp pricing, with distance-sensitive pricing the cost of moving power through a company depends on how far the power moves within the company. In contrast to contract path pricing, flow-based pricing establishes a price based on the costs of the various parallel paths actually used when the power flows. Because flow-based pricing can account for all parallel paths used by the transaction, all transmission owners with facilities on any of the parallel paths could be compensated for the transaction.

[96]FERC Stats. & Regs. 31,005 at 31,136.

Commission further explained that comparability of service applies to price as well as to terms and conditions.[97]

The Commission issued the Pooling Notice of Inquiry to receive comments on traditional power pools and on alternative power pooling institutions that are being explored in today's more competitive environment. The Commission expressed concern that

> [g]iven the ongoing changes in the competitive environment of the electric utility industry--in particular, the potential for substantially increased access to transmission--we must consider whether we are appropriately balancing our dual objectives of promoting coordination and competition.[98]

Accordingly, the Commission explained that it wished to look at alternative power pooling institutions and to re-examine the role of more traditional power pools in today's environment of increased competition. In particular the Commission expressed its intent to ensure that its policies "are consistent with the development of a competitive bulk power ."[99]

In the RTG Policy Statement, the Commission announced a policy encouraging the development of RTGs. The Commission explained that a primary purpose of RTGs is to facilitate transmission access for potential users and voluntarily resolve disputes over such service. The Commission has approved the formation of three RTGs.[100] One of the conditions is that each RTG member must offer comparable transmission services by tariff to other RTG members.

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[97]Id. at 31,142.

[98]FERC Stats. & Regs. 35,529 at 35,715.

[99]Id. at 35,714. As explained below, the Commission held technical conferences on issues surrounding power pools and competition.

[100]See WRTA and SWRTA, supra, and Northwest Regional Transmission Association, 71 FERC 61,397 (1995).

In the merger NOI, the Commission indicated that it will review whether its criteria and policy for evaluating mergers need to be modified in light of the changing circumstances occurring in the electric industry.

In addition to the Commission's actions, a number of states have initiated proceedings concerning retail wheeling or proposed legislation for retail wheeling, that is, for ultimate consumers to choose their supplier of power, or other restructuring proposals.[101]

5. Events Since Issuance of Open Access NOPR

Since issuance of the Open Access NOPR, public utilities have filed, in some form or another, 47 open access tariffs. In acting on those filings, the Commission has made all of the non-rate terms and conditions of those proposed tariffs subject to the outcome of this Final Rule.[102]

Over the last year, the Commission also has received and analyzed more than 20,000 pages of comments that were received from over 400 commenters, as well as additional information provided by industry participants at a number of

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[101]At least 12 states have retail wheeling proposals, legislation, or pilot programs underway--Alabama, California, Connecticut, Illinois, Massachusetts, Michigan, New Hampshire, New York, Ohio, Rhode Island, Vermont, and Wisconsin. At least 14 other states are investigating retail wheeling. Currently, according to a report of the NARUC-affiliated National Council on competition and the Electric Industry, 41 States are actively involved in investigating whether and how to restructure their respective electric power markets. Of this total, 29 State regulatory authorities * * * have initiated investigations. In addition, five State legislatures are involved in similar investigations, while seven other States have joint regulatory legislative proceedings underway.

Testimony of the Honorable Cheryl L. Parrino, Chair of the Wisconsin Public Service Commission, on behalf of the National Association of Regulatory Utility Commissioners, before the United States Senate Committee on Energy and Natural Resources (March 6, 1996).

[102]See American Electric Power Service Corporation, et al., 72 FERC 61,287 at 61,238 (1995).

Commission-initiated technical conferences.[103] Those technical conferences addressed several issues--ancillary services, pro forma tariffs, power pools, and ISOs--and provided significant input to the Commission's formulation of this Final Rule.

F. Need for Reform

The many changes discussed above have converged to create a situation in which new generating capacity can be built and operated at prices substantially lower than many utilities' embedded costs of generation. As discussed above, new generation facilities can produce power on the grid at a cost of less than 3 cents per kWh to 5 cents per kWh, yet the costs for large plants constructed and installed over the last decade were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.

Non-traditional generators are taking advantage of this opportunity to compete. Indeed, the non-traditional generators' share of total U.S. electricity generation increased from 4 percent in 1985 to 10 percent in 1993.[104] Much of this increased share of generation is the result of competitive bidding for new generation resources that has occurred in 37 states. Since 1984, almost 4,000 projects, representing over 400,000 MW, have been offered in response to requests. Over 350 projects have been selected to supply 20,000 MW, and, of these, 126 are now online producing almost 7,800 MW of power.[105]

In addition, the cost of utility-generated electricity differs widely across the major regions of the United States. Average utility rates range from 3 to 5 cents in the Northwest to 9 to 11 cents in California. Electricity consumers are demanding

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[103]Attached to this Final Rule as Appendix B is a list of commenters and the abbreviations used to designate them, including those commenters that filed late.

[104]Energy Information Administration, Performance Issues for a Changing Electric Power Industry (January 1995) 10 and (Figure 5).

[105]Current Competition, November 1994, Vol. 5, No. 8, at 8.

access to lower cost supplies available in other regions of the United States, and access to the newer, lower cost generation resources. Therefore, it is important that the non-traditional generators of cheaper power be able to gain access to the transmission grid on a non-discriminatory open access basis.

The Commission's goal is to ensure that customers have the benefits of competitively priced generation. However, we must do so without abandoning our traditional obligation to ensure that utilities have a fair opportunity to recover prudently incurred costs and that they maintain power supply reliability. As well, the benefits of competition should not come at the expense of other customers. The Commission believes that requiring utilities to provide non-discriminatory open access transmission tariffs, while simultaneously resolving the extremely difficult issue of recovery of transition costs (discussed *infra*), is the key to reconciling these competing demands.

Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.[100] Transmitting utilities own the transportation system over which bulk power competition occurs and transmission service continues to be a natural monopoly. Denials of access (whether they are blatant or subtle), and the potential for future denials of access, require the Commission to revisit and reform its regulation of transmission in interstate commerce. As discussed in detail in section IV.B., such action is required by the FPA's mandate that the Commission remedy undue discrimination.

Since the time the NOPR issued, the Commission staff has completed an FEIS that provides a quantitative estimate of

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[100] As discussed above, a significant number of public utilities still do not have any form of an "open access" tariff on file with the Commission and no public utility has on file a non-discriminatory open access tariff as defined by this Rule.

some of the cost savings expected from this Rule: approximately $3.8 to $5.4 billion per year. Other non-quantifiable benefits are also expected from this Rule and include: (1) Better use of existing assets and institutions; (2) new market mechanisms; (3) technical innovation; and (4) less rate distortion. These potential benefits to the Nation's electricity consumers and the economy as a whole confirm the need to take generic action to remove barriers to competition. In what follows, we set out the changes necessary to remedy undue discrimination and to ensure a fair transition to a more competitive regulatory regime.

IV. Discussion

A. Scope of the Rule

1. Introduction

The Commission has determined that non-discriminatory open access transmission services (including access to transmission information) and stranded cost recovery are the most critical components of a successful transition to competitive wholesale electricity markets. These issues are the focal point of this Rule, the accompanying rule on open access same-time information systems, and the accompanying proposed rule on capacity reservation tariffs.

In undertaking these initiatives, however, we are mindful that they are part of a broader picture of evolving issues affecting the electric industry and that other Commission policies will play an important role in ensuring the full development of competitive markets. Among the many issues that are important to competitive bulk power markets are: independent system operators (ISOs); regional transmission groups; generation market power; utility merger policy; and the development of innovative transmission pricing alternatives, such as flow-based, distance-sensitive transmission pricing methodologies that reflect incremental costs. In particular, we believe that ISOs have great potential to assist us and the industry to help provide regional efficiencies, to facilitate

economically efficient pricing, and, especially in the context of power pools, to remedy undue discrimination and mitigate market power. Although we discuss some of these issues in this Rule, we will further develop our policies in other proceedings as well to accommodate and encourage more efficient market structures.

We now address the comments received on the scope of the proposed rulemaking.

2. Functional Unbundling

In the NOPR, the Commission preliminarily found that functional unbundling of wholesale generation and transmission services is necessary to implement non- discriminatory open access transmission.[107] At the same time, the Commission explained that the proposed rule would accommodate, but not require, corporate unbundling (which could include selling generation or transmission assets to a non-affiliate (divestiture) or the less aggressive step of establishing separate corporate affiliates to manage a utility's transmission and generation assets). However, we invited comments on functional unbundling and asked whether it is a strong enough measure to ensure non-discriminatory open access transmission without some form of corporate restructuring.

Comments

Commenters take both sides on whether functional unbundling is sufficient to assure non-discriminatory open access transmission or whether a stronger measure, such as corporate unbundling, is needed.

Supporting Functional Unbundling

Various commenters, including utilities and state commissions, generally support functional unbundling as sufficient to assure non-discriminatory open access transmission and oppose requiring corporate unbundling or

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[107]FERC Stats. & Regs. 32,514 at 33,080.

divestiture.[108] Several commenters state that functional unbundling will remedy discrimination without creating the inefficiencies and additional costs that corporate restructuring would create.[109]

A number of other commenters argue that the Commission has no authority under the FPA to require divestiture of transmission assets.[110] Several of these commenters assert that, even if the Commission has the authority, the electric industry, unlike the natural gas industry, is not ready for mandated corporate unbundling because electric utilities still serve a high percentage of retail customers and own large amounts of the generating capacity. They assert that transmission system operation requires the operator to have control over much of the generating capacity.

Various other commenters also support functional unbundling, but believe that safeguards are needed to make it work.[111] Power Marketing Association, for example, suggests a number of safeguards: adoption of cost allocation mechanisms to ensure that utilities do not shift costs from generation to transmission; random audits of utility books; a requirement that each utility file a code of conduct that provides for maximum separation of generation and transmission functions; and active oversight and complaint procedures with strong penalties for

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[108]E.g., Ohio Edison, UtiliCorp, Pennsylvania P&L, Atlantic City, Montana Power, IL Com, Seattle, OK Com, TX Industrials, MidAmerican, Southwestern, Southern, DOD, Public Service Co of CO, SC Public Service Authority, Florida Power Corp, DOE, WP&L, Com Ed, SBA, Consumers Power, CA Com, UT Com, Houston L&P, KCPL, EEI.

[109]E.g., Florida Power Corp, El Paso, PSNM, and SC Public Service Authority.

[110]E.g., Southwestern, PECO, El Paso, Florida Power Corp, NSP, Public Service E&G, MidAmerican.

[111]E.g., NRECA, IN Com, Power Marketing Association, TDU Systems, NorAm, Turlock, Texaco, Utility Shareholders, NSP, El Paso, Utility Investors Analysts, PECO, Florida Power Corp, UT Com, Sierra, Carolina P&L, SoCal Gas, OK Com, FL Com, Southern.

abuse. OK Com and GA Com believe that functional unbundling along with the safeguard of the Commission's complaint process will provide sufficient incentive for non-discriminatory open access transmission.

Supporting Corporate Unbundling

A number of commenters see weaknesses in functional unbundling and argue that some form of corporate unbundling is necessary to assure non- discriminatory open access transmission.[112] American Forest & Paper says that there is affiliate abuse in the gas industry and argues that the electric industry presents even more serious potential for abuse because it is still dominated by vertically integrated utilities.[113] UAMPS asserts that functional unbundling is insufficient because the utility will still favor itself on issues related to transmission planning, capital investment, and operation and maintenance and replacement costs.

NIEP argues that divestiture of generation assets from transmission and distribution is the preferred mechanism for mitigating market power. It further suggests that if corporate divestiture is not feasible the Commission should

> Seek to achieve "virtual divestiture" by requiring that the utility generation function be separated from transmission and distribution functions in a separate corporate affiliate, or business unit, and that affiliate transaction rules be established to guard against possible abuses.[114]

It maintains that the Commission has broad authority to protect against undue discrimination and anticompetitive

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[112]E.g., American Forest & Power, American National Power, ND Com, IL Com, UAMPS, NIEP, APPA, Public Power Council, Municipal Energy Agency Nebraska, Missouri Basin MPA, Texaco, Direct Services Industries, Calpine, CCEM, Wisconsin Coalition, VT DPS.

[113]See also American National Power, ND Com, Calpine.

[114]NIEP Initial Comments at 4.

behavior and can order divestiture if such action is required to remedy such behavior.[115]

FTC and DOJ argue that operational unbundling, an example of which is the formation of an independent system operator (ISO), likely would be more effective than functional unbundling and less costly than industry-wide divestiture.[116] FTC describes operational unbundling as "structural institutional arrangements, short of divestiture, that would separate operation of the transmission grid and access to it from economic interests in generation." It gives as an example the California proposal under which utilities would continue to own transmission lines, but an independent system operator would have operational control. DOJ also suggests "a separate authority" to manage the grid and access to the grid, joint ventures, and voluntary pooling arrangements. These commenters argue that operational unbundling would be easier to enforce than functional unbundling.

DOE states that separation of the control of transmission from vertically- integrated companies does not necessarily require a poolco or any particular market mechanism. It suggests the possibility of an ISO that is functionally separate from any buyer or seller of generation, but would not perform all the functions of a poolco.

United Illuminating supports "operational unbundling" that would either (1) eliminate vertical integration and divestiture of transmission assets, leading to the formation of a regional transmission company, or (2) develop a regional contractual approach to transmission services that eliminates the transmission owner's market power and fairly allocates support of the transmission facilities between native load and third-party users of the system.

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[115]See also Municipal Energy Agency Nebraska, Direct Services Industries.

[116]Others oppose operational unbundling. See, e.g., Carolina P&L, Salt River.

Commission Conclusion

We conclude that functional unbundling of wholesale services is necessary to implement non-discriminatory open access transmission and that corporate unbundling should not now be required. As we explained in the NOPR, functional unbundling means three things:

(1) A public utility must take transmission services (including ancillary services) for all of its new wholesale sales and purchases of energy under the same tariff of general applicability as do others;

(2) A public utility must state separate rates for wholesale generation, transmission, and ancillary services;

(3) A public utility must rely on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power.

We believe that these requirements are necessary to ensure that public utilities provide non-discriminatory service.[117] These requirements also will give public utilities an incentive to file fair and efficient rates, terms, and conditions, since they will be subject to those same rates, terms, and conditions.

However, we recognize that additional safeguards are necessary to protect against market power abuses. Functional unbundling will work only if a strong code of conduct (including a requirement to separate employees involved in transmission functions from those involved in wholesale power merchant functions) is in place. In the RINs NOPR, the Commission proposed a code of conduct that would apply to all

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[117]When and how functional unbundling is to be achieved for requirements transactions and for various types of coordination arrangements, including power pools, is discussed at Sections IV.A.5 and IV.F. Functional unbundling of ancillary services is discussed in Section IV.D.

public utility transmission providers. As the Commission explained,

> [t]his code of conduct would require, among other matters, a separation of the utilities' transmission system operations and wholesale marketing functions, and would define permissible and impermissible contacts between employees that conduct wholesale generation marketing functions and employees that handle transmission system operations and reliability in the system control center or at other facilities or locations.[118]

Adoption of this code of conduct, discussed in detail in the accompanying final rule on OASIS,[119] is needed to ensure that the transmission owner's wholesale marketing personnel and the transmission customer's marketing personnel have comparable access to information about the transmission system.

As noted by OK Com and GA Com, a further safeguard--section 206--is available if a public utility seeks to circumvent the functional unbundling requirements. Under section 206, any person is free to file a complaint with the Commission detailing any alleged misbehavior on the part of the public utility or its affiliates concerning matters subject to our jurisdiction under the FPA. Similarly, the Commission may, on its own motion, initiate a proceeding to investigate the practices of the public utility and its affiliates.

We believe that functional unbundling, coupled with these safeguards, is a reasonable and workable means of assuring that non-discriminatory open access transmission occurs. In the absence of evidence that functional unbundling will not work,

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[118]Real-Time Information Networks and Standards of Conduct, Notice of Proposed Rulemaking, 60 FR 66182 (December 21, 1995), FERC Stats. & Regs., Proposed Regulations 32,516 at 33,170 (1995).

[119]The final rule on information systems no longer uses the terminology RINs. The new terminology used is OASIS--Open Access Same-time Information System--which we will use in this Final Rule.

we are not prepared to adopt a more intrusive and potentially more costly mechanism--corporate unbundling--at this time.

Several commenters discuss the need to encourage or even to require ISOs in the context of functional unbundling. We believe that ISOs have the potential to provide significant benefits (*e.g.*, to help provide regional efficiencies, to facilitate economically efficient pricing, and, especially in the context of power pools, to remedy undue discrimination and mitigate market power) and will further our goal of achieving a workably competitive market. As we learned at our technical conference on power pools, many utilities are examining ISOs and corporate unbundling in various shapes and forms, particularly in the context of power pools. We discuss ISOs extensively in our section on power pools where we believe they will have an important role to play. However, in the context of individual utility transactions, we believe that the less intrusive functional unbundling approach outlined above is all that we must require at this time. Nevertheless, we see many benefits in ISOs, and encourage utilities to consider ISOs as a tool to meet the demands of the competitive marketplace.

As a further precaution against discriminatory behavior, we will continue to monitor electricity markets to ensure that functional unbundling adequately protects transmission customers. At the same time, we will analyze all alternative proposals, including formation of ISOs, and, if it becomes apparent that functional unbundling is inadequate or unworkable in assuring non- discriminatory open access transmission, we will reevaluate our position and decide whether other mechanisms, such as ISOs, should be required.

Finally, while we are not now requiring any form of corporate unbundling, we again encourage utilities to explore whether corporate unbundling or other restructuring mechanisms may be appropriate in particular circumstances. Thus, we intend to accommodate other mechanisms that public utilities may submit, including voluntary corporate restructurings (e.g., ISOs, separate corporate divisions,

divestiture, poolcos), to ensure that open access transmission occurs on a non-discriminatory basis. We also will continue to monitor--and stand ready to work with parties engaging in--innovative restructuring proposals occurring around the country.

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B. Legal Authority

The Commission reaffirms its conclusion in the NOPR that we have the authority under the FPA to order wholesale transmission services in interstate commerce to remedy undue discrimination by public utilities. We analyze below the relevant cases examining our wheeling authority, then discuss and respond to the legal arguments raised by the commenters.

1. Bases for Legal Authority

a. Undue Discrimination/Anticompetitive Effects

In upholding the Commission's order requiring non-discriminatory open access in the natural gas industry, the court in *Associated Gas Distributors v. FERC* stated that the Natural Gas Act "fairly bristles" with concern for undue discrimination.[193] The same is true of the FPA. The Commission has a mandate under sections 205 and 206 of the FPA to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. We must determine whether any rule, regulation, practice or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and must prevent those contracts and practices that do not meet this standard. As discussed below, *AGD* demonstrates that our remedial power is very broad and includes the ability to order industry-wide non-discriminatory

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[193]Associated Gas Distributors v. FERC, 824 F.2d 981, 998 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (AGD).

open access[194] as a remedy for undue discrimination. The *AGD* court reached this decision even in the face of prior cases that acknowledged that Congress did not mandate common carriage or explicitly empower the Commission to order direct access for either gas transporters or electric utilities. Moreover, the Commission's power under the FPA "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to (FPA) sections 202 and 203, and under like directives contained in sections 205, 206, and 207."[195]

Therefore, based on the mandates of sections 205 and 206 of the FPA and the case law interpreting the Commission's authority over transmission in interstate commerce, we conclude that we have ample legal authority--indeed, a responsibility--under section 206 of the FPA to order the filing of non- discriminatory open access transmission tariffs if we find such order necessary as a remedy for undue discrimination or anticompetitive effects.[196] We discuss below the primary court decisions that touch on our wheeling authority under sections 205 and 206.

The Commission's authority to order access as a remedy for undue discrimination under the Natural Gas Act (NGA) was upheld and discussed in detail in *AGD*. In *AGD*, the court

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[194]We use the term "open access" to refer to a public utility's obligation to put a tariff on file offering service to eligible customers. Access is not open to all. Specifically, the tariff is not an offer to serve retail customers if state law does not permit retail wheeling.

[195]Gulf States Utilities Company v. FPC, 411 U.S. 747, 758-59 (1973).

[196]In most situations, discrimination that precludes transmission access or gives inferior access will have at least potential anticompetitive effects because it limits access to generation markets and thereby limits competition in generation. Similarly, it is probable that any transmission provision that has anticompetitive effects would also be found to be unduly discriminatory or preferential because the anticompetitive provision would most likely favor the transmission owner vis-a-vis others.

upheld in relevant part the Commission's Order No. 436.[197] That order found the prevailing natural gas company practices to be "unduly discriminatory" within the meaning of section 5 of the NGA (the parallel to section 206 of the FPA) and held that if pipelines wanted blanket certification for their transportation services, they must commit to transport gas for others on a non-discriminatory basis; in other words, they must provide non-discriminatory open access.

In upholding the Commission's authority to require open access, the court first noted that the opponents' arguments against such authority must proceed "uphill." The statute contains no language forbidding the Commission to impose common carrier status on pipelines, let alone forbidding the Commission to impose "a specific duty that happens to be a typical or even core component of such status." The court found that the legislative history cited by the opponents came nowhere near overcoming this statutory silence. Rather, the legislative history supported only the proposition that Congress itself declined to impose common carrier status.[198] Emphasizing Congress' deep concern with undue discrimination, the court found that the Commission had ample authority to "stamp out" such discrimination:

> The issue seems to come down to this: Although Congress explicitly gave the Commission the power and the duty to achieve one of the prime goals of common carriage regulation (the eradication of undue discrimination), the Commission's attempted exercise of that power is invalid because Congress in 1906 and 1914 and 1935 and 1938 itself refrained from affixing common carrier status directly onto the pipelines and from authorizing the Commission to do so. And this proposition is said to

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[197]Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Stats. & Regs., Regulations Preambles 30,665 (1985).

[198]AGD, supra, 824 F.2d at 997.

> control no matter how sound the Order may be as a response to the facts before the Commission. We think this turns statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one.[199]

The *AGD* court found that court decisions under the FPA did not support the view that the Commission's authority to "stamp out" undue discrimination is hamstrung by an inability to require non-discriminatory open access as a remedy. These decisions are discussed below.

One of the earliest cases on wheeling is *Otter Tail Power Company v. United States (Otter Tail).*[200] In that case, the Supreme Court rejected the argument that the District Court, in a civil antitrust suit, could not order wheeling because to do so would conflict with the FPC's purported wheeling authority.[201] The Court explained that Congress had decided not to impose a common carrier obligation on the electric power industry and noted that the Commission was not at that time expressly granted power to order wheeling.[202] In effect, it concluded that because Congress did not include common carrier provisions in the FPA, the Commission must not have any express authority to order wheeling that would preclude the District Court from imposing a wheeling remedy. Nowhere, however, did the Court say that the Commission lacked authority under section 206 to remedy undue discrimination. Indeed, that was simply not a matter before the Court or of any consequence to its decision.

In the FPA, while Congress elected not to impose common carrier status on the electric power industry, it tempered that determination by explicitly providing the Commission with the authority to eradicate undue discrimination-- one of the goals of

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[199]Id. at 998.

[200]410 U.S. 366 (1974).

[201]410 U.S. at 375-76.

[202]Id. at 374-76.

common carriage regulation.[203] By providing this broad authority to the Commission, it assured itself that in preserving "the voluntary action of the utilities" it was not allowing this voluntary action to be unfettered. It would be far-reaching indeed to conclude that Otter Tail, which was a civil antitrust suit that raised issues entirely unrelated to our authority under section 206, is an impediment to our achieving one of the primary goals of the FPA--eradicating undue discrimination in transmission in interstate commerce in the electric power industry.

In *Richmond Power & Light Company v. FERC (Richmond)*,[204] the FPC, in reaction to the 1973 oil embargo, was attempting to reduce dependence on oil. The FPC requested that utilities with excess capacity wheel power to the New England Power Pool (NEPOOL). In response, several suppliers and transmission owners filed rate schedules with the FPC that provided for voluntary wheeling. Richmond Power & Light Company (Richmond) objected to these filings, claiming that they were unreasonable because they did not guarantee transmission access. The FPC refused to compel the utilities to wheel Richmond's power, stating that it did not have the authority to order a public utility to act as a common carrier.

The D.C. Circuit upheld the Commission. It acknowledged that Richmond's argument was persuasive in some respects, but stated that any conditions the Commission might impose could not contravene the FPA. The court examined the legislative history of the FPA and stated that "[i]f Congress had intended that utilities could inadvertently bootstrap themselves into common-carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling * * *."[205]

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[203]See AGD, 824 F.2d at 998.

[204]574 F.2d 610 (D.C. Cir. 1978).

[205]Id. at 620.

However, the D.C. Circuit in no way indicated that the Commission was foreclosed from ordering transmission as a remedy for undue discrimination. Richmond also had argued that the alleged refusal of the American Electric Power Company (*AEP*) and its affiliate, Indiana & Michigan Electric Company (Indiana), to wheel Richmond's excess energy was unlawful discrimination because *AEP* and Indiana wheeled higher-priced electricity from other *AEP* affiliates. The court acknowledged that Richmond's claim of unlawful discrimination was theoretically valid, but found that Richmond had failed to prove its case. It noted that if Richmond had argued that the rates were unjustifiably discriminatory, or that Indiana's failure to use its transmission capability fully or to purchase less expensive electricity for wheeling resulted in unnecessarily high rates, a different case would be before the court.[206] The case thus does not in any way limit the Commission's authority to remedy undue discrimination.

In *Central Iowa Power Cooperative v. FERC*,[207] the FPC[208] reviewed the terms of the Mid-Continent Area Power Pool (MAPP) Agreement under its section 205 and 206 authority. The agreement contained two membership limitations. First, the agreement established two classes of membership, with one class being entitled to more privileges than the other. Second, the agreement excluded non-generating distribution systems from pool services. The FPC found the first limitation on membership--the two-class system--to be unduly discriminatory and not reasonably related to MAPP's objectives. The FPC conditioned approval of the agreement under section 206 on the removal of the unduly discriminatory provision. The FPC found that the second limitation, the exclusion of non-generating

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[206]Id. at 623, nn.53 and 57.

[207]606 F.2d 1156 (D.C. Cir. 1979).

[208]While Central Iowa was pending, certain of the functions of the FPC were transferred to the FERC under the DOE Organization Act. Accordingly, the FERC was substituted for the FPC as the respondent in the case.

distribution systems, was not anticompetitive and did not render the agreement inconsistent with the public interest.

On appeal, the D.C. Circuit affirmed the FPC's decision. The court found that the FPC did have authority to order changes in the scope of the MAPP agreement, *if* the agreement was unjust, unreasonable, unduly discriminatory or preferential under section 206 of the FPA. The court stated:

> The Commission had authority, * * * under section 206 of the Act, * * * to order changes in the limited scope of the Agreement, including the addition of pool services, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract (that was) unjust, unreasonable, unduly discriminatory or preferential."[209]

However, the court agreed with the FPC's conclusion that the limited scope of MAPP was not unjust, unreasonable, or unduly discriminatory. The court recognized that a pool was not invalid under section 206 merely because a more comprehensive arrangement was possible.

The D.C. Circuit upheld the Commission's refusal to eliminate the second limitation on membership by ordering MAPP participants to wheel to non- generating electric systems.[210] However, neither the Commission nor the court was presented with the argument that wheeling was necessary as a remedy for undue discrimination.

In *Florida Power & Light Company v. FERC* (Florida),[211] the Commission ordered Florida Power & Light Company (FP&L) to file a tariff setting forth FP&L's policy relating to the

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[209]606 F.2d at 1168.

[210]Id. at 1169; see also Municipalities of Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978).

[211]660 F.2d 668 (5th Cir. 1981), cert. denied sub nom. Fort Pierce Utilities Authority v. FERC, 459 U.S. 1156 (1983).

availability of transmission service.[212] FP&L objected to including such a policy statement in its tariff and argued that the filing of such a policy would convert FP&L into a common carrier by obligating it to offer service to all customers.[213] There was no finding that the action ordered was necessary to remedy undue discrimination.

The Fifth Circuit Court of Appeals agreed with FP&L that the mandatory filing of the policy statement would require FP&L to provide transmission service beyond its voluntary commitment because such a requirement would change its duties and liabilities.[214] The Commission order would impose common carrier status on FP&L, the court found.[215] The court noted that the Commission did not rely on a finding of anticompetitive behavior and therefore the court did not address the Commission's power to remedy antitrust violations.[216]

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[212]FP&L provided transmission service when four conditions were met: (1) The specific potential seller and buyer were contractually identified; (2) the magnitude, time and duration of the transaction were specified prior to the commencement of the transmission; (3) it could be determined that the transmission capacity would be available for the term of the contract; and (4) the rate was sufficient to cover FP&L's costs.

[213]All utilities requesting wheeling services, subject to availability, would be entitled to receive transmission service under the filed terms. Any changes to a filed rate must be filed with the Commission. This is the so-called "filed rate doctrine." See Northwestern Public Service Company v. Montana-Dakota Utilities Company, 181 F.2d 19, 22 (8th Cir. 1980), aff'd, 341 U.S. 246 (1951).

[214]Under the filed rate doctrine, a refusal to wheel would be unduly discriminatory under section 206 of the FPA. As the court acknowledged, a customer refused service could petition the Commission to find that FP&L's policy of availability was unduly discriminatory under section 206(a) of the FPA. The court said that in the absence of a tariff on file, a utility refused wheeling services would be unable to claim discrimination under section 206(a) of the FPA. 660 F.2d at 675 (expressing "serious doubts that such a petition would be successful in the absence of a tariff").

[215]Id. at 676.

[216]Id. at 678.

The *AGD* court explicitly rejected the claim that the above line of cases establishes that the Commission lacks authority to require non-discriminatory open access.[217] Opponents of the Commission's order argued in *AGD* that *Richmond* and *Florida, supra*, stand for the proposition that the Commission cannot indirectly do what it allegedly cannot do directly, that is, impose common carriage. The *AGD* court rejected these arguments, stating that the petitioners read the electric cases far too broadly:

> [n]either *Richmond* nor *Florida* comes anywhere near stating that the Commission is barred from imposing an open-access condition in all circumstances.[218]

The court noted that the *Florida* case had expressly left open the question of whether the Commission would be entitled to use an open access condition as a remedy for anticompetitive conduct, and that in Richmond the D.C. Circuit had said little more than that unwillingness to transmit for all could not be automatically deemed undue discrimination. The court also noted the *Central Iowa* case, *supra*, in which it had upheld a Commission order that found a power pooling agreement discriminatory on its face because the agreement gave one class of membership privileged status over another. The court stated that the *Central Iowa* case "upholds the power of the Commission to subject approval of a set of voluntary transactions to a condition that providers open up the class of permissible users."[219] The court added that it refused to "turn statutory construction upside down" by letting Congress' failure to grant a general power of common carriage prevail over the

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[217]The AGD court did not address New York State Electric & Gas Corporation v. FERC, 638 F.2d 388 (2d Cir. 1980), cert. denied, 454 U.S. 821 (1981) (NYSEG), presumably because that case did not concern whether the Commission could order wheeling as a remedy for undue discrimination.

[218]824 F.2d at 999.

[219]Id. at 999.

affirmative grant of the specific power to eradicate undue discrimination.[220]

We conclude that *AGD*'s analysis of undue discrimination under sections 4 and 5 of the Natural Gas Act is equally applicable to an undue discrimination analysis under sections 205 and 206 of the FPA. The Commission and courts have long recognized that the NGA was patterned after the FPA and that the two statutes should be interpreted in the same manner.[221]Thus, we conclude that we have the authority to remedy undue discrimination and anticompetitive effects by requiring all public utilities that own, control or operate transmission facilities to file non-discriminatory open access transmission tariffs.

b. Section 211 of the Federal Power Act

In concluding that we must invoke our section 206 authority to remedy undue discrimination and anticompetitive effects in the electric industry, we have carefully considered the goals of Title VII of the Energy Policy Act, and whether section 211 of the FPA, by itself, is sufficient to remedy undue discrimination in public utility transmission services. Title VII of the Energy Policy Act, which amended section 211 of the FPA to give the Commission broader authority to order wheeling in the public interest on a case-by-case basis, reflects the intent of Congress to encourage competitive wholesale electric markets. Section 211 provides a means for wholesale power sellers and buyers to obtain transmission services necessary to compete in, or to reach, competitive markets, and is a valuable tool to encourage competitive markets. However, in amending section 211,

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[220]Id. at 1006.

[221]See, e.g., FPC v. Sierra Pacific Power Company, 350 U.S. 348, 353 (1956); Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 577 n.7 (1981); and Kentucky Utilities Company v. FERC, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985). Section 206 of the FPA was recently revised and now differs from section 5 of the NGA, but not in a manner significant to our discussion here. See 16 U.S.C. 824e (b) and (c).

Congress left unaltered the authorities and obligations of the Commission under sections 205 and 206 (similar to our authorities and obligations under sections 4 and 5 of the NGA) to remedy undue discrimination. In addition, as discussed below, reliance on section 211 alone in some circumstances can result in the perpetuation of, rather than the elimination of, undue discrimination and anticompetitive effects.

First, there are inherent delays in the procedures for obtaining service under section 211. However, for competitive reasons, many transactions must be negotiated relatively quickly. Many competitive opportunities will be lost by the time the Commission can issue a final order under section 211. Case-by- case section 211 proceedings are not a substitute for tariffs of general applicability that permit timely, non-discriminatory access on request.

Second, discrimination is inherent in the current industry environment in which some customers and sellers are served by open access systems, and others have to rely on negotiated bilateral arrangements or the mandatory section 211 process. The end result is discrimination in the ability to obtain transmission services, as well as in the quality and prices of the services. This national patchwork of open and closed transmission systems, with disparate terms and conditions of service, cannot be cured effectively through section 211.

The Commission believes that its actions under sections 205 and 206 will complement the section 211 procedures to achieve both the Energy Policy Act's goals of creating more competitive bulk power markets and lower rates for consumers and the Federal Power Act's explicit direction in section 205(b) that no public utility shall, with respect to any transmission in interstate commerce, grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.

2. Response to Commenters Opposing Our Legal Authority

a. Authority to Order Open Access Tariffs

Comments

Initial Comments Supporting Commission Authority

A number of commenters support or state that they do not oppose the Commission's authority to order open access tariffs.[222] NIEP and CCEM explain that the *AGD* decision supports the Commission's action in this proceeding. ELCON asserts that the Commission's "extensive treatment of the relevant case law demonstrating FERC's authority to remedy this discrimination is legally sound." UtiliCorp argues that section 211 supports, rather than undermines, the Commission's authority for the NOPR because it reflects Congress's intention to encourage more competitive bulk power markets.

Initial Comments Opposing Commission Authority

Other commenters assert that the Commission has improperly relied on sections 205 and 206 of the FPA to require open access.[223] They argue, for instance, that *Otter Tail* should be read as a broad constraint on the Commission's authority to order wheeling for any purpose and that the *AGD* decision does not undermine that holding or the cases following *Otter Tail*.[224]In support, some of these commenters discuss *Richmond Power & Light, New York State Electric & Gas Corporation*, and *Florida Power & Light Company*, the same cases discussed by the Commission in the NOPR.[225]

For example, EEI highlights the *AGD* court's discussion noting the difference between the legislative history of the NGA

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[222]NIEP, ELCON, CINergy, UtiliCorp, TAPS, SBA, Entergy, NY Energy Buyers, Sierra.

[223]E.g., EEI, Atlantic City, Allegheny, VA Com, PA Com, Ohio Edison, Southern, Utilities For Improved Transition, Dayton P&L, SCE&G, Centerior, BG&E, Central Hudson, NY Com, Salt River, Carolina P&L, Union Electric, VEPCO, Utility Workers Union.

[224]EEI, VA Com, Union Electric.

[225]E.g., EEI, VA Com, NY Com, PA Com, Salt River, Southern, Dayton P&L, Detroit Edison, BG&E.

and that of the FPA, which the court stated was not as strong as that of the NGA. Moreover, EEI argues that the court found that section 7 of the NGA provided support for the Commission's actions in Order No. 436 and that such section 7 conditioning authority is lacking under the FPA. Allegheny notes that *AGD* did not overrule *Otter Tail*. Dayton P&L states that, in the gas case, the Commission was responding to voluntary filings by pipelines. It also says that before the NOPR, the Commission itself saw its authority as more limited. SCE&G points to differences between Commission jurisdiction over public utilities and gas pipelines and criticizes the Commission's alleged assumption that the circumstances involved in the gas and electric industries are virtually identical.

PA Com argues that the attempt to analogize to the NGA and the cases that refer to that Act is inconsistent with the technical and engineering realities of the electric transmission grid and that extensive comparisons between the natural gas industry and the electric industry are misleading.[226]

FL Com argues that, in relying on sections 205 and 206 to establish generic open access transmission tariffs for all public utilities, the Commission violates the court's decision in *Cajun Electric Power Cooperative v. FERC*, 28 F.3d 173 at 179 (D.C. Cir. 1994), where, FL Com argues, the court refused to allow the Commission to use a non-evidentiary ruling when there were material facts at issue.

Reply Comments

CCEM responds that EEI and others confuse the obligations of a common carrier with the duty of public utilities not to unduly discriminate. It says that *AGD* supports the Commission's authority because the legislative history of the FPA and the NGA are similar with respect to common carriage. According to CCEM, early versions of both statutes would have made the regulated industries operate as common carriers

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[226]See also NY Com (NGA has no parallel provision to section 211 of the FPA), Salt River.

(citing *Otter Tail*, the legislative history of the FPA, the legislative history of the Public Utility Holding Company Act, and the legislative history of the Mineral Leasing Act), but that Congress chose not to impose the common carrier obligations.

CCEM also says that the duties the Commission imposed on the gas industry and those in the NOPR are not common carriage in any event. According to CCEM, a common carrier must carry all goods offered (citing *Am. Trucking Assoc. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 406 (1967)). Finally, CCEM cites *Stephenson v. Binford*, 287 U.S. 251, 265-66 (1932), where the Supreme Court held that obligations that are typical of common carriers can be imposed on contract motor carriers.

CCEM further disagrees with EEI's argument that the enactment of section 211 was a disavowal of any other Commission authority to order transmission.

ELCON also disagrees with EEI's claim that the Energy Policy Act undermines the Commission's pre-existing section 205 and 206 authority. It states that the savings clause in section 212(e) of the FPA, as amended, explicitly expresses Congress' intention not to undermine the Commission's pre-existing authority and that the legislative history contains nothing to suggest otherwise.

Similarly, in response to those who argue that section 211 is the only source of authority for the Commission to order transmission, NIEP argues that sections 211 and 212 serve purposes different from section 206. It says that the Commission's authority to order transmission in the "public interest" under sections 211 and 212 is not synonymous with its authority to order transmission as a remedy for undue discrimination under section 206; the two standards are complementary but distinct:

Although broadly applicable, the Commission's ability to order wheeling under sections 211 and 212 is carefully limited by a number of procedural provisions. Foremost among these

is the requirement that the wheeling may be ordered only upon a specific application for transmission services. FERC's authority to act in the public interest is thus confined to the individual case.

By contrast, FERC's remedial powers under Section 206 can be exercised upon a finding of unjust, unreasonable or unduly discriminatory or preferential practices. Once that finding has been made, however, the form and substance of the remedy is left entirely to the FERC's discretion. If FERC deems it necessary, FERC may adopt generally applicable rules or practices as a countermeasure to discriminatory acts, including ordering utilities to file generally applicable transmission tariffs.[227]

NIEP also points out that the legislative history does not address the Commission's authority to order transmission as a remedy for undue discrimination. It challenges the interpretation of the legislative history advanced by some commenters.[228]

Next, NIEP defends the Commission's proposed findings that there is generally undue discrimination in the provision of transmission service. It notes that when an agency acts on an

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[227]NIEP Reply Comments at 8.

[228]NIEP explains that

> (W)hile much has been made of the Senate report accompanying S.2114, which subsequently became part of PURPA in 1978, that report does not illustrate an intent to limit FERC's authority to remedy undue discrimination under section 206. That report characterizes the Supreme Court's decision in Otter Tail as holding that "the Federal Power Act leaves open a gap in its failure to assign the FPC general authority to order wheeling in this situation * * *." The "situation" to which the Report refers is not discrimination, however. Instead, the statement appears to make reference to circumstances in which general public interest concerns, such as reliability, efficiency and competition, are at stake. Thus, Senate Report 2114 is simply not a limitation on the Commission's remedial powers under Sections 206.
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> NIEP Reply Comments at 8-9 (citations omitted).

industry-wide basis, the agency does not have to make a finding as to each particular case.

Finally, NIEP responds to those who argue that *AGD* is not on point. It notes that the *AGD* court discussed electric cases and emphasizes the court's statement that the NGA "fairly bristles with concern for undue discrimination"--a statement that is equally true of the FPA.

TDU Systems responds to the argument that *Otter Tail* is a broad constraint on the Commission's authority to order transmission.[229] At issue in that case, it argues, was the reach of the Sherman Act, not of FPA sections 205 and 206. Similarly, it argues, the *Florida Power* case is not on point, and the court there specifically said that it was not deciding whether the Commission could have ordered wheeling as a remedy for anticompetitive activities. Moreover, TDU Systems asserts that EEI's use of a quote from a single Senator should carry no weight, since it is a well-established principle of statutory construction that such statements have little value. Finally, it points out that the *AGD* court itself did not view *Otter Tail* or other electric precedent as forbidding the Commission to order wheeling as a remedy for undue discrimination.

Entergy asserts that Congress's refusal to require utilities to provide transmission as common carriers or whenever it is in the public interest was merely a decision not to give the Commission general authority to order wheeling, without regard to undue discrimination. Thus, the Otter Tail language concerning the absence of a common carrier requirement does not demonstrate that Congress meant to limit the Commission's authority to remedy undue discrimination.

ELCON disputes EEI's reading of NYSEG, noting that the NYSEG court explicitly stated:

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[229]See also Entergy.

Nor do we suggest that the Commission is powerless to review a wheeling agreement under section 206 without following the requirements of sections 211 and 212.[230]

TAPS discusses numerous cases, including the primary cases relied upon by the Commission, and disposes of NYSEG by stating that it is no longer good law, if it ever was.

Commission Conclusion

There can be no question that the Commission has the authority to remedy undue discrimination. Sections 205 and 206 of the FPA mandate that we ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. Under these sections, we must determine whether any rule, regulation, practice, or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and we must disapprove those contracts and practices that do not meet this standard. Our discretion is at its zenith in fashioning remedies for undue discrimination.[231]

Some commenters, however, challenge our authority to order industry-wide non- discriminatory open access as a remedy for the undue discrimination we have found in the industry. As summarized above, they essentially assert that we are prohibited by court precedent, the legislative history of the FPA, and sections 211 and 212 of the FPA from ordering wheeling as a remedy for undue discrimination. We disagree and conclude that we have the authority--indeed, a responsibility--to require non-discriminatory open access transmission as a remedy for undue discrimination.

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[230]ELCON Initial Comments at 7 (quoting NYSEG at 403).

[231]See, e.g.,- Niagara Mohawk Power Corporation v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967)

AGD and Legislative History

The court decision in *Associated Gas Distributors v. FERC* provides powerful support for our ability to order industry-wide non-discriminatory open access transmission in the electric industry as a remedy for undue discrimination. As discussed in detail above, *AGD*, which is the only decision to have addressed the Commission's authority to remedy undue discrimination by requiring open access, upheld our authority under section 5 of the NGA (the parallel to section 206 of the FPA) to require open access in the natural gas industry. The rationale supplied by the *AGD* court applies equally to the FPA and our responsibility to eliminate undue discrimination in the electric industry.

Those who challenge the Commission's legal authority to remedy undue discrimination face the same difficulty that parties faced in seeking to overturn open access in the natural gas industry--they "can point to no language in the (FPA) barring the Commission from imposing common carrier status on (public utilities), and certainly none barring it from imposing upon the (public utilities) a specific duty that happens to be a typical or even core component of such status."[232] Instead, as was unsuccessfully attempted in the *AGD* proceeding, they seek to overcome the statutory silence primarily by means of legislative history. However, as the *AGD* court explained, legislative history is not even relevant, because

> courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference.[233] Here, as the court found with respect to the NGA, the legislative history of the FPA "provides strong support only for the point that Congress declined *itself to impose common carrier status on (public utilities)* * * * *It affords weak--almost invisible--support for the idea that*

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[232] AGD, 824 F.2d at p. 997.

[233] Id. (quoting IBEW, Local No. 474 v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987) (emphasis deleted by court from original)).

> *the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty."*[234]

Commenters focus on the following statement in the *AGD* decision to support the argument that, because Congress did not expressly reject common carriage under the NGA, but did reject it under the FPA, a different outcome in this proceeding is required:

> we note that the legislative history of the two acts is, on this point, materially different. In its deliberations on the bill that ultimately emerged as the Federal Power Act, Congress considered and rejected a provision that would have "empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.'" (citing *Otter Tail*) (quoting S. 1725, 74th Cong., 1st Sess.). The evidence as to the NGA (surveyed above) is less direct: it consists exclusively of various occasions on which Congress did not adopt proposals actually making the natural gas pipelines into common carriers.[235]

The above statement, however, does not preclude the *AGD* court's decision on our broad authority to remedy undue discrimination in the gas industry from applying equally in the electric industry. Clearly, the court did not say that. As discussed below, we believe the statement focuses on a distinction in the legislative histories that is not meaningful.

First, whether or not a material difference exists in the respective legislative histories of the NGA and FPA, the fact remains that the crucial findings of the *AGD* court were that: (1) "Congress declined *itself* to impose *common carrier status*" (emphasis added) and (2) there is no "support for the idea that the Commission could under no circumstances whatsoever

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[234]Id. (emphasis added).

[235]Id. at 998-99.

impose obligations encompassing the core of a common carriage duty."[236] These findings apply equally to the FPA. Simply stated, statutory silence cannot be overcome by means of legislative history--even if the legislative history in fact indicated that Congress "rejected" legislative imposition of common carrier status under the FPA, but "did not adopt" it under the NGA. In either event, nothing in the statute or legislative history suggests that Congress concluded that the Commission could under no circumstances impose open access as a remedy to undue discrimination.

Moreover, the legislative history of the bills containing the FPA and the NGA, taken as a whole, suggests that the distinction drawn in *AGD* between the legislative histories of the NGA and the FPA is not meaningful. The legislation that was to become the FPA originally included provisions regulating both electric power and natural gas. As originally proposed, the legislation contained *identical* common carriage language for both public utilities and natural gas pipelines.

With respect to the FPA, the Supreme Court explained in *Otter Tail* that (a)s originally conceived, Part II would have included a "common carrier" provision making it "the duty of every public utility to * * * transmit energy for any person upon reasonable request * * *." In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be "necessary or desirable in the public interest." H.R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong. 1st Sess. These provisions were eliminated to preserve "the voluntary action of the utilities." S.Rep. No. 621, 74th Cong., 1st Sess., 19.[237]

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[236]Id. at 997. We also note that the contract carriage obligation we are imposing is easily distinguished from the common carrier obligation Congress chose not to adopt. As discussed infra, the common carrier provisions rejected by Congress would have required transmission for "any person" upon reasonable request. This would have included retail purchasers.

[237]Otter Tail, 410 U.S. at 374.

The language paraphrased by the Supreme Court was from Title II of the initial bill proposing the Public Utility Holding Company Act. The entire sections from which the paraphrased language came are as follows:

SEC. 202. (a) It shall be *the duty of every public utility* to furnish energy to, exchange energy with, and *transmit energy for any person upon reasonable request* therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort, and convenience of all its customers, employees, and the public, and shall be in all respects adequate, efficient, and reasonable.

* * *

SEC. 203. (b) Whenever the Commission after notice and opportunity for hearing finds such action *necessary or desirable in the public interest*, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more other persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons. Where any such order affects two or more persons, the Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.[238]

This initial bill proposing the Public Utility Holding Company Act also included a Title III that was intended to regulate the transmission and sale of natural gas. Sections 303(a) and 304 of Title III included the *identical* common carrier language paraphrased by the Supreme Court and included in sections 202(a) and 203(b) of Title II.[239] After

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[238]H.R. 5423, 74th Cong., 1st Sess., 32 (emphasis added).

[239]Id. at 44.

further deliberations, Congress rejected the above-quoted language in Title II and eventually adopted a Title II that did not include any common carrier language. On the other hand, Title III (addressing regulation of natural gas) was not reported out of committee, but reemerged in the next year.[240] The bill that reemerged did not contain the common carrier language that was in the original Title III. However, as Congress had just debated the common carrier issue in enacting electric power regulation, it is not surprising that Congress did not engage in debating the very same issue in enacting natural gas regulation.

Because of the timing of the legislation involving the FPA and the NGA and the logical nexus between the two acts, we conclude that there is in fact no material difference as to this issue in the legislative histories of the two acts. Both initially included identical common carrier language, and the language was removed from both. As to both acts, Congress chose not to impose common carrier obligations on the electric or natural gas industries, but gave the Commission the authority and responsibility to eliminate undue discrimination in both industries. Consequently, as open access was found to be a proper remedy for undue discrimination in the natural gas industry, it is also a proper remedy for undue discrimination in the electric industry.

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[240]In the debate on the subsequent bill to regulate natural gas, Congressman Cole explained:

> Mr. Chairman, the House should realize that the measure we are dealing with today is of extreme importance, more so than the attendance and the time taken in the discussion would seem to indicate. It is the culmination of one of the most far-reaching, intensive studies of the Federal Trade Commission I assume that that Commission ever conducted, and last year found a place in not identical language but very similar in the Rayburn bill, the famous holding-company bill, as part 3 thereof. Our committee eliminated part 3, as members will recall, and saved it for a separate measure reported out as it was last year, which was not considered by the House, but is here today in improved form. Cong. Rec. H6724 (daily ed. July 1, 1937).

As the *AGD* court noted with respect to the Commission's powers and duties under the NGA, Congress explicitly gave the Commission the authority to eradicate undue discrimination under the FPA. That explicit power and duty provided by Congress cannot be invalidated solely on the ground that Congress chose not to impose statutory common carrier status on public utilities or did not explicitly authorize the Commission to do so.[241] As the AGD court explained, this would "turn [] statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one."[242]

Other Case Law

A number of commenters argue that the Commission misinterpreted the other cases discussed in the NOPR with respect to our authority to order non- discriminatory open access transmission. We disagree. As demonstrated above, not one of the cases put forth by commenters holds that we cannot remedy undue discrimination by requiring public utilities to provide non- discriminatory open access transmission.[243]

AGD is the only case in which a court specifically addressed our authority to order open access transmission as a remedy for undue discrimination. Its favorable finding with respect to our action under section 5 of the NGA directly supports our ordering non-discriminatory open access transmission under section 206 of the FPA.

Authority to Act by Rule

We disagree with those commenters that assert that we may find and remedy undue discrimination only through case-by-

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[241]AGD, 824 F.2d at 998.

[242]Id.

[243]See FERC Stats. & Regs. at 33,053-56. We further note that the AGD court did not discuss the NYSEG decision at all. Indeed, the NYSEG case did not involve any allegations of undue discrimination and any discussion of section 206 by the court was dictum.

case adjudications and are prohibited from making a generic determination of undue discrimination through a rulemaking. First, there is no question that it is within our discretion whether we act through rule or through case-by-case adjudications.[244] The AGD court specifically rejected a similar argument that the Commission erred in requiring open access transportation tariffs without first finding that each individual pipeline's rates were unlawful. The AGD court held that "(t)he Commission is not required to make individual findings if it exercises its s5 authority by means of a generic rule."[245]

We have identified a fundamental generic problem in the electric industry: owners, controllers and operators of monopoly transmission facilities that also own power generation facilities have the incentive to engage, and have engaged, in unduly discriminatory practices in the provision of transmission services by denying to third parties transmission services that are comparable to the transmission services that they are providing, or are capable of providing, for their own power sales and purchases. These practices drive up the price of electricity and hurt consumers. Furthermore, the incentive to engage in such practices is increasing significantly as competitive pressures grow in the industry. It is within our discretion to conclude that a generic rulemaking, not case-by-case adjudications, is the most efficient approach to take to resolve the industry-wide problem facing us.

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[244]See, e.g., NLRB v. Bell Aerospace Company, 416 U.S. 267, 293 (1974) (citing SEC v. Chenery Corporation, 332 U.S. 194, 202-03 (1947). See also Heckler v. Campbell, 461 U.S. 458, 467 (1983) (even where enabling statute requires a hearing to be held, agency may rely on its rulemaking authority); Panhandle Eastern Pipeline Company v. FERC, 907 F.2d 185, 187- 88 (D.C. Cir. 1990). Under section 403 of the DOE Act, 42 U.S.C. 7173, the Commission is authorized at its discretion to initiate rulemaking proceedings.

[245]AGD, 824 F.2d at 1008.

b. Undue Discrimination/Anticompetitive Effects

Initial Comments

A number of commenters allege that the Commission has failed to meet its burden of proving industry-wide discrimination.[246] They assert that the Commission has provided only a few unsubstantiated allegations of discrimination, which do not represent the current conditions in the electric industry, or that the Commission has not shown that all electric utilities have unduly discriminated. Some attack the NOPR's incorporation by reference of the unsubstantiated allegations of discrimination set forth in a petition for rulemaking filed on February 16, 1995 by the Coalition for a Competitive Electric Market (CCEM).[247]

EEI argues that the allegations of discrimination in the NOPR must be considered in light of the fact that: (1) All tariffs currently on file have been found by the Commission not to be discriminatory; (2) more than 30 utilities have voluntarily filed open access tariffs, which belies any assertion of widespread discrimination in the industry; and (3) transmission disputes are rare, with only 19 section 211 proceedings having been filed in the last three years.[248] EEI concludes that the Commission's allegations of discrimination do not rise to the level of "extreme circumstances" found by the court in the natural gas industry in AGD.

EEI adds that the Commission's proposal to act under section 206 is itself discriminatory because it applies only to public utilities and does not reach all transmission-owning utilities.[249] If reciprocity is designed to resolve this problem, EEI believes that reciprocity should also be "effective for public

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[246]E.g., EEI, Ohio Edison, PA Com, BG&E, NY Com, Minnesota P&L, Carolina P&L.

[247]E.g., EEI, BG&E.

[248]See also Ohio Edison.

[249]See also SCE&G.

utilities." Furthermore, EEI argues that the failure of a public utility to provide to others a service that it does not provide itself is not evidence of discrimination, and that inclusion of such a provision actually results in preferential treatment for transmission users.

NE Public Power District alleges that the NOPR does not contain a single reference to any actual discrimination or anticompetitive conduct by any publicly owned utility.

Salt River asserts that the Commission is required to consider all elements of an antitrust analysis before reaching a conclusion that market power exists in the transmission system and that we have failed to do so.[250] It concludes that the NOPR "constitutes an attempt to legislate a remedy for an evil that has not been, and cannot be, lawfully found to exist on a wholesale basis among utilities that own and operate integrated generation and transmission systems."[251]

PA Com argues that the Commission's request for examples of discriminatory behavior is a "tacit admission as to the paucity of evidence of discriminatory practices by transmission owning utilities." NY Com argues that the "Commission's lack of a record basis for its proposed findings is legally suspect because courts in two cases have held that the Commission cannot proceed with open access transmission tariffs absent record findings of specific anticompetitive conduct."[252]

Finally, EEI claims that even if the Commission has proven its allegations of discrimination, we have failed to meet the requirements of section 206 of the FPA.[253] According to EEI, the Commission cannot find, without an adjudicatory hearing,

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[250]Salt River Initial Comments at 5-6 (referencing an attached legal memorandum of Donald A. Kaplan).

[251]Salt River Initial Comments at 6.

[252]NY Com Initial Comments at 16-18 (discussing FPL and Cajun).

[253]See also Southern.

that the rates on file are unlawful and order replacement rates.[254] The Commission's proposed procedure would unlawfully place the burden of justifying existing rates on the utilities.

Reply Comments

A number of commenters provide instances of discriminatory behavior they have faced over the years. NCMPA describes difficulties it has faced in dealing with CP&L, including a situation where CP&L allegedly impeded NCMPA's use of transmission access through CP&L's control of dispatching.[255]

AMP-Ohio alleges that Toledo Edison refused to transmit emergency power on a buy-sell basis to certain AMP-Ohio members even though Toledo Edison's system was not constrained. Instead, AMP-Ohio alleges, Toledo Edison bought the power and resold it to AMP-Ohio at a higher rate.

APPA challenges EEI's claim that there is no substantial evidence of undue discrimination in transmission. It suggests that nineteen instances of transmission disputes being filed since the Energy Policy Act was enacted is ample evidence of undue discrimination. Moreover, according to APPA, reported abuses are only the tip of the iceberg.

CCEM responds to the argument raised by EEI and others that there is no showing of extreme circumstances of discrimination in the electric industry such as the AGD court noted in the gas industry. It says that these circumstances are present and gives numerous examples; it does not identify the specific utilities because "it is the experience of * * * (our) members that nearly all transmission owners retaliate * * *" against anyone who complains. Moreover, in answer to EEI's statement that transmission disputes are rare, CCEM states that since most of the competition is in the short-term market, it has

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[254]See also Southern.

[255]We note that CP&L raised legal objections to our authority to implement this rule.

not been worthwhile to file complaints. The examples provided by CCEM include: (1) Refusal by a California public utility to offer firm service; (2) refusal by control area utilities in Texas to offer ancillary services to a power marketer, with the result that one of the utilities won the bid, even though it did not have the lowest price; (3) non-utilities in ERCOT being unable to compete to meet short-term requests for economy energy because they were required to schedule by noon of the preceding day, while utilities did not subject themselves to such a scheduling requirement; (4) power pool or control area information requirements, particularly in the northwest part of WSPP, that force non-utilities to reveal commercially sensitive information; the transportation operator has then revealed the information to its own or its affiliate's sales arm, which "steals" the deal; (5) a northeast power pool that refused to wheel out even though capacity was available on the grounds that sending power out of the pool would drive up prices in the pool (hoarding); (6) a power marketer that asked a utility to provide transmission, whereupon the utility bought up certain transmission capacity necessary for the marketer to reach its buyer, thus blocking the path--this was possible because the utility was able to locate the purchaser based on commercially sensitive information the marketer had to give the utility when the marketer asked for transmission; (7) a common contracting practice among utilities restricting the use of interconnections to themselves, particularly in the Southwest Power Pool, MAPP, and MAIN; (8) utilities overstating the cost of improvements (gold-plating) and thus discouraging service. CCEM also responds to each of EEI's criticisms of CCEM's examples of undue discrimination submitted in its February 16, 1995 petition and argues that its examples of undue discrimination are unrebutted.

Brownsville asserts that

> while PUB [Brownsville] must pay multiple distance-based and pancaked transmission rates to engage in transactions with the non-ERCOT universe, El Paso Electric would have *received* transmission payments from its merger

partners while gaining *free* transmission access to buy and sell within ERCOT. CSW presently walls other ERCOT utilities off from participation in the Western Systems Power Pool, while its ERCOT subsidiaries, CPL and WTU, share in the benefits of their non-ERCOT affiliates' WSPP memberships via the preferential terms of the CSW Operating Agreement. CSW treats its own inter-affiliate central dispatch as having a higher priority than third-party economy energy transactions, with the result that CPL not infrequently crowds PUB out of the economy market.[256]

Wisconsin Municipals states that its members have been fighting transmission battles for years and sets forth five examples of the sort of difficulties it has experienced in attempting to obtain transmission rights. For example, it explains that Wisconsin public utilities have resisted an effort by the state commission to achieve comparability of use of transmission. Wisconsin Municipals also explains a situation where "if WPPI continued to purchase its power from WPSC, it would pay WPSC $843,840 annually for transmission service: if it purchases power off system from WP&L (one of WPSC's competitors), WPPI would pay WPSC $1,774,224 for transmission service to the exact same load."

TAPS sets forth additional examples of undue discrimination, including refusals to wheel even in the face of Nuclear Regulatory Commission (NRC) nuclear license conditions requiring wheeling, and Northeast Utilities' refusal to provide transmission to a QF even though it had indicated to the Commission that it would provide such transmission in order to obtain Commission approval of its proposed merger with Public Service Company of New Hampshire.

NIEP sets forth ten examples of undue discrimination that its members have experienced in seeking access to transmission service at reasonable terms and conditions.

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[256] Brownsville Reply Comments at 2-3 (emphasis in original).

Some commenters challenge these claims of undue discrimination. For example, Carolina P&L responds to NCMPA #1's example of obstruction by Duke in accommodating energy sales from the jointly owned Catawba Plant. Carolina P&L explains that NCMPA #1's proposal "would require Duke to provide its own generation resources on behalf of NCMPA #1 in order to support a bulk power sale when NCMPA #1's own resource capacity and energy are not sufficient for the sale." Carolina P&L argues that this is backstanding that goes beyond the scope of any ancillary service the Commission has proposed and would be entirely inappropriate "to compel the Transmission Provider to sell power to its Transmission Customer for resale on the bulk power market."

Duke also responds to NCMPA #1's claim of discrimination and asserts that NCMPA #1's claim is not relevant to the NOPR proceeding, but is a specific contractual claim that should be pursued pursuant to the terms of its contract.

Commission Conclusion

We conclude that unduly discriminatory and anticompetitive practices exist today in the electric industry and, more importantly, that such practices will increase as competitive pressures continue to grow in the industry, unless the Commission acts now to prevent such practices.[257] It is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves. The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the

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[257]While many public utilities have filed some form of open access tariff (often in response to our proposed rule), we believe that many of the remaining utilities will not voluntarily open their systems absent a final rule. See also note 266.

bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices. As the *AGD* court stated: "Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[258]

We set forth examples in the NOPR of undue discrimination that we believe are occurring in the electric industry and invited commenters to identify any discrimination that they may have experienced. In response, commenters presented numerous additional examples of undue discrimination, which are summarized above, and we set forth below further examples of undue discrimination that have been raised in cases before the Commission.

Many of the examples of discriminatory behavior that have been brought to our attention do not name the specific utilities involved, and many are allegations that are not proven. However, we do not believe that this undermines our finding of unduly discriminatory practices by transmission owners and controllers. We believe that it is only natural that potential transmission customers with an interest in participating in electric markets will be reluctant to name names for fear of being shut out of those markets. CCEM, which identified a wide array of discriminatory behavior its members have experienced, explained that

> [w]e do not identify the specific utilities in each example because it is the experience of CCEM members that nearly all transmission owners retaliate by cutting off all communications with anyone that challenges or complains about the rates, terms or conditions at which the owner offers access to its system. Inasmuch as most of the competitive commerce in electric power today is in short-term markets, it is typically not worth the effort of CCEM members or other transmission-dependent entities to file a complaint with the Commission's enforcement staff or in

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[258] AGD, 824 F.2d at 1008.

> the courts in connection with a transmission owner's discriminatory practices. The deal is lost well before a complaint can be processed and ruled upon.[259]

Other examples of discriminatory behavior have also been raised in proceedings before the Commission. As we explained in detail in the NOPR, transmission-owning utilities have discriminated against others seeking transmission access in a variety of ways, most often subtly and indirectly.[260] For example, delaying tactics have been used to frustrate access. The history of Pacific Gas and Electric Company's (PG&E) attempt to avoid its commitments made to the California owners of the California-Oregon Transmission Project (COTP) is a prime example. The owners had originally planned the COTP to have its southern terminus at the Midway station with Southern California Edison. PG&E convinced them to terminate the project instead at PG&E's Tesla station and indicated that PG&E would provide transmission service the rest of the way south to Midway. PG&E promised this service in 1989 (in Principles). PG&E spent the next four years filing substitute provisions for what it had promised in the Principles.[261] Additional allegations of discriminatory behavior are set forth in Appendix C, which includes allegations made under oath in proceedings at the Commission and allegations made in pleadings and other documents before the Commission.

In addition, to date, the Commission has received 28 section 211 transmission requests.[262] Applicants submit section 211

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[259]CCEM Initial Comments at 18-19. See also NIEP Reply Comments at 13 n.31.

[260]FERC Stats. & Regs. at 33,072.

[261]See Pacific Gas and Electric Company, 65 FERC 61,312 at 62,428-30 and n.22, remanded on other grounds, Pacific Gas & Electric Company v. FERC, No. 94-70037 (9th Cir. June 23, 1994) (unpublished opinion), order on remand, 69 FERC 61,006 (1994).

[262]A list of section 211 applications and the status of each is attached as Appendix A.

transmission requests when the transmission provider refuses to provide the requested transmission service. For example, American Municipal Power-Ohio, Inc. (AMP-Ohio) requested Ohio Edison Company (Ohio Edison) to establish additional delivery points to certain of AMP-Ohio's members and to permit the addition of delivery points in the future upon AMP-Ohio's request. Ohio Edison refused AMP-Ohio's request, claiming that it was not a proper request under section 211 because it already provided wholesale transmission to the municipal utilities at issue. In a proposed order, the Commission disagreed with Ohio Edison and ordered Ohio Edison to provide the requested additional delivery points and to entertain future requests by AMP-Ohio for specific delivery points.[263]

Many of the examples of discriminatory actions we are seeing in the electric industry are similar to those we saw in the gas industry. Given our experience, we find that these examples of discriminatory actions are credible and well-founded. Thus, we conclude that there is more than sufficient reason to believe that transmission monopolists currently engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so. In light of the competitive changes occurring in today's electric industry, we believe that the only effective remedy is non-discriminatory open access transmission, including functional unbundling and OASIS requirements, and that it is within our statutory authority to order that remedy.

Further, we disagree with the argument that we are limited to applying a traditional antitrust analysis in determining whether market power exists in the transmission system. While we must take antitrust concerns into consideration in exercising our responsibilities under the FPA, we are not an antitrust court,

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[263] American Municipal Power-Ohio, Inc. v. Ohio Edison Company, 74 FERC 61,086 (1996).

and our responsibilities are not those of the Department of Justice.[264] We have analyzed the incentives and practices of monopoly transmission owners and controllers in light of the statutory standards and directives of the FPA and, based on our findings, have properly concluded that there is a generic problem that must be remedied.

The Commission also recognizes, as some commenters suggest, that we have, in the past, permitted utilities to file tariffs containing restrictions on transmission service that we are now finding to be unduly discriminatory in this rule and that we found unduly discriminatory in cases since our decision in *AEP*. However, it is entirely appropriate, and indeed necessary, that our application of the FPA's undue discrimination standard evolve over time and adapt to the changing circumstances in the industry. Our prior willingness to tolerate the use of monopoly power over transmission to maintain and aggregate the utility's market power over generation occurred in the context of an industry structured largely as vertically integrated regulated monopolies that supplied all facets of utility service--power supply, transmission, and distribution--as a single monopoly service. Competition generally was not meaningfully available as a means to discipline prices and consumer interests were best served by improving efficiencies of the integrated utilities, subject to cost-based regulation.

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[264] See, e.g., Gulf States Utilities Company v. FPC, 411 U.S. 747, 758-60 (1973); FPC v. Conway Corporation, 426 U.S. 271, 279 (1976); Northern Natural Gas Company v. FPC, 399 F.2d 953, 960 (D.C. Cir. 1968).

Today, the circumstances of the industry are radically different. As explained in detail in Section III, a series of significant economic, regulatory, and technical changes in the power industry has introduced the promise of competitively priced power supplies. The profile of electric power suppliers has expanded to include not just the power supply arms of traditional utilities, but also independent power suppliers, affiliated utility power suppliers selling into territories of other franchise utilities, and power marketers.[265] This offers the promise of an increasingly competitive commodity market in electric power, in which significant benefits to consumers can be achieved. In the context of an emerging competitive market in generation, discriminatory practices that once did not constitute undue discrimination must be reviewed to determine whether they are being used to prevent the benefits of competition in generation from being achieved. Here we find conclusively that they are, and use our remedial authority to ensure that they can no longer occur.[266]

c. Section 211

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[265]We note that there are now 14 power marketers that are affiliated with public utilities.

[266]We take note of EEI's comments that, at the time of the comments, 30 utilities had filed open access tariffs. They argue, therefore, that the rule is unnecessary. Since their comment was filed, the number of utilities filing some form of an open access tariff has risen to 106. However, while some of these tariffs are based on the NOPR pro forma tariffs, many of these tariffs fall significantly short of the tariff requirements of both the NOPR and this Rule. Even if the tariffs met these requirements, the Rule is still needed to complete the task of eliminating undue discrimination by all public utilities and assuring, to the extent possible, a nationwide open access transmission grid. Indeed, a number of these tariffs were filed for the purposes of securing authority to market power competitively. This underscores markedly our fundamental conclusion that prior practices of using monopoly power over transmission to preserve market power over electricity sales has no place in today's industry and must be eliminated to get the benefits of competition to the customers we are required to protect under the FPA.

Comments

Various commenters contend that the enactment of section 211 in essence either removed any authority the Commission might have had under sections 205 and 206 or demonstrates that Congress did not believe the Commission could order wheeling under those provisions.

These commenters assert that the legislative history of the FPA indicates that Congress specifically rejected giving the Commission authority to order wheeling under any circumstances.[267] They further contend that the legislative history of section 211 demonstrates that Congress viewed the authority it granted in section 211 as a strictly limited and entirely new authority for the Commission.[268] Specifically, EEI states that the legislative history of the Energy Policy Act confirms that the expanded authority provided under section 211 was not intended to grant the Commission blanket authority to order wheeling, even as a remedy for anticompetitive conduct. Similarly, Utilities For Improved Transition argues that the legislative history shows that Congress specifically intended to preclude the Commission from ordering tariffs of general applicability under any circumstances. In addition, EEI points to testimony provided by a Commission staff witness before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce in which EEI claims that "she suggested that an affirmative statement that the Commission had the power to require wheeling on its own motion should be included, possibly in section 211." EEI maintains that such suggestion was rejected by Congress in favor of allowing the Commission to order wheeling only upon application.

Detroit Edison, asserting that Cajun stands for the proposition that the agency must follow Congressionally

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[267]E.g., EEI, VA Com, Ohio Edison Southern, Utilities For Improved Transition, BG&E.

[268]See also NM Com.

mandated procedures, claims that the Commission can order transmission only after going through the procedures of section 211. Detroit Edison also argues that the Commission should incorporate into the final rule the various safeguards of section 211, such as the requirement that the utility receive prior notice, the requirement that transmission service be in the public interest, and the requirement that existing service not be displaced. FL Com further asserts that it was Congressional intent in the Energy Policy Act for wheeling to be ordered on a case-by-case basis pursuant to section 211.[269]

EEI argues that the enactment of section 211 eliminated any authority the Commission had under sections 205 and 206 to order wheeling as a remedy for undue discrimination. It alleges that the Commission failed to discuss the NYSEG case concerning the relationship between section 211 and sections 205 and 206 in any meaningful way. According to EEI, the NYSEG court concluded that section 211 "was the only appropriate vehicle under which the Commission could order NYSEG to wheel power for the municipality."[270] EEI further

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[269] See also Salt River. Moreover, FL Com states that the Commission should modify its hearing process to better accommodate state PUC participation by: (1) Holding hearings in the affected state; (2) teleconferencing; (3) making free transcripts available to states; and (4) substantially deferring to a state when the state commission has held a hearing on an issue in the case.

[270] EEI quoted the following language from NYSEG:

> Nor do we suggest that the Commission is powerless to review a wheeling agreement under section 206 without following the requirements of sections 211 and 212. If, after a hearing as required by section 206, the Commission determines that a particular rate, charge or condition is unreasonable, it can order a modification. But where, as here, the modification amounts to an order requiring wheeling, it must be preceded also by determination in accordance with sections 211 and 212. Simply put, we will not allow the Commission to do indirectly without compliance with the statutory prerequisites, what it could not do directly without such compliance. (citing Richmond Power & Light).

resorts to canons of statutory construction to conclude that "section 211 must be given effect as the more specific provision and must be interpreted to limit the scope of sections 205 and 206."[271] In addition, EEI asserts that "Congress had an opportunity to reject the NYSEG court's interpretation of the scope of sections 205, 206 and 211, but instead amended section 211 in a manner that is consistent with the view that mandatory wheeling is to be governed exclusively by section 211." Dayton P&L raises similar arguments. It notes the savings provision in section 212(e), but says that Congress "would have been more specific if it understood that the Commission already had the authority to order wheeling under FPA sections 205 and 206. * * *"[272]

Associated EC argues that the NOPR appears to exceed the Commission's authority in that it proposes that "wholesale buyers and sellers have 'equal access to the transmission grid.'" It asserts that "Section 211(a), however, makes mandatory transmission service available only to '[a]ny electric utility, Federal power marketing agency or any other person generating electric energy for sale for resale.'"[273]

NE Public Power District argues that sections 211 and 212 of the FPA appear clearly to contemplate a case-by-case approach.[274] NE Public Power District adds that if the Commission believes sections 211 and 212 are inconsistent

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[271] See also VA Com.

[272] See also Carolina P&L.

[273] This argument is puzzling. First, section 211 does not control to whom access must be provided under sections 205 and 206. However, even if it did, Associated EC appears to misconstrue eligibility under section 211. An electric utility as defined in the FPA is any person or State agency (including any municipality) which sells electric energy. The definition does not say that electric energy must be re-sold at wholesale. Thus, an electric utility could be a wholesale buyer of transmission used to transmit energy for sale at either wholesale or retail.

[274] See also Allegheny.

with the public interest, it can ask Congress to modify those provisions. Allegheny adds that the Commission can order wheeling only under sections 211 and 212 on a company-specific basis and can use sections 205 and 206 only to evaluate the reasonableness of terms and conditions of voluntarily filed agreements or tariffs by public utilities.

Utilities For Improved Transition also claims that sections 211 and 212 override any authority the Commission might have had under sections 205 and 206 to order industry-wide open access. It cites the savings clause in section 212(e) of the FPA as limiting the Commission's authority to order transmission.[275] Utilities For Improved Transition argues at some length that the NOPR does not meet the procedural and substantive standards of sections 211 and 212. It goes on to cite various passages from the legislative history of the Energy Policy Act as supporting the view that Congress intended to eliminate the Commission's authority to order industry-wide open access as a remedy for undue discrimination. According to Utilities For Improved Transition, these passages "unmistakably show a clear legislative intent to preclude the mandatory transmission that the Commission attempts here * * *."

Commission Conclusion

We disagree with those commenters that argue that the Energy Policy Act either eliminates our authority under section 206 to remedy undue discrimination by requiring non-discriminatory open access transmission or demonstrates that

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[275] It states that:

> Section 212(e), however, provides that Sections 211 and 212 limit or impair the Commissions authority under "another provisions of law" (a phrase including, obviously, Sections 205 and 206). On the face of the statute--we say again for emphasis: on the face of the statute--the Commission therefore does not have the authority to order transmission service outside the provisions of Sections 211 and 212.

Utilities For Improved Transition Initial Comments at 51 (emphasis in original).

we never had any such authority. Nothing in sections 211 and 212 or in the legislative history of these sections indicates that Congress intended to eliminate the Commission's other, broader authorities under the FPA. Indeed, section 212(e) specifically provides:

> SAVINGS PROVISIONS.--(1) No provision of section 210, 211, 214, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 210, 211, 214, or this section, *such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law*.[276]

Utilities For Improved Transition's argument that the "Except as provided" clause limits or impairs the Commission's authority to order transmission service under sections 205 and 206 would make the savings provision meaningless. Moreover, such a reading would be entirely at odds with the underlying purposes of the Energy Policy Act. It would be ironic indeed to interpret the Energy Policy Act as eliminating our long-standing, broad authority to remedy undue discrimination, given the pro-competitive purpose of the statute.

The legislative history also provides no support for the arguments that sections 211 and 212 remove or prove the non-existence of the Commission's authority to remedy undue discrimination by requiring non-discriminatory open access transmission. In fact, virtually every bit of legislative history raised by commenters opposing the NOPR consists of various statements by Senator Wallop, an opponent of expanding transmission access under sections 211 and 212.[277] Such

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[276] 16 U.S.C 824k (emphasis added).

[277] In discussing the electricity provisions of the Energy Policy Act, Senator Wallop declared:

> It would be a mistake to take the presence of transmission access provisions in the Conference Report as a sign of change in position on my part or that of the Senate. I would have strongly preferred PUHCA reform

legislative history provides no insight into the meaning of a statute and is given little or no weight by the courts.[278]

The only other legislative history that commenters put forth is the testimony of a Commission staff witness, in 1992 hearings before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce. According to EEI, the witness indicated that an affirmative statement that the Commission could require wheeling on its own motion "would be needed [in the Energy Policy Act] if Congress intends for the Commission to be able to deal with transmission on its own motion and thereby go further than simply dealing with industry proposals." EEI claims that this statement demonstrates that the expanded authority in the Energy Policy Act "was not intended to grant the Commission blanket authority to order wheeling, even as a remedy for anticompetitive conduct."

EEI's argument is misleading and disingenuous. It takes the witness's statements out of context, ignoring attendant testimony that "there are strong legal arguments that the Commission's obligation to protect against undue discrimination carries with it the authority to impose transmission requirements as a remedy for undue preference or discrimination," and the extensive legal argument, included in her testimony, in favor of that position--an argument that closely parallels the legal argument the

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without any transmission access provisions, as was the Senate position. However, in order to obtain the very significant benefits of PUHCA reform contained in the Senate bill, it was necessary to accept some of the House transmission access provisions.

[278]See, e.g., Shell Oil Company v. Iowa Department of Revenue, 488 U.S. 19, 29 (1988) (Shell). In Shell, the Court declared:

> This Court does not usually accord much weight to the statements of a bill's opponents. "[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 (1981) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951).

See also Sutherland Statutory Construction s48.16 at 366.

Commission is relying on in this proceeding.[279] Indeed, in the face of such explicit testimony from the staff of the agency required to implement the statute, had Congress intended to limit the Commission's remedial authority under section 206 when it amended section 211, we believe it would have explicitly done so in the language of the statute itself, or at least have indicated its intent to do so in the Conference Report on the Energy Policy Act.[280]

C. Comparability

1. Eligibility to Receive Non-Discriminatory Open Access Transmission ¶ In the NOPR, the Commission proposed to define who is eligible to receive service under a non-discriminatory open access tariff as follows:A non-discriminatory open-access tariff must be available to any entity that can request transmission services under section 211.[281]

The Commission further explained that "[u]nder section 211, any electric utility, Federal power marketing agency, or any

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[279]Hearings on H.R. 1301, H.R. 1543, and H.R. 2224 before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. (May 1,2 and June 26, 1991), Statement of Cynthia A. Marlette, Associate General Counsel, Federal Energy Regulatory Commission, Report No. 102-60 at 60 and 61-70. See also id. at 106 ("I believe that we have substantial authority under the existing case law to mandate access where necessary to remedy anticompetitive effects.").

[280]At the time Congress enacted amendments to FPA section 211, it was well aware that the Commission had unexplored authorities under sections 205 and 206 of the FPA to compel wheeling. The only explicit limitations it chose to impose on the Commission's wheeling authorities were those contained in sections 212(g) and (h), which provide that no order "under this Act" may be inconsistent with any State law governing retail marketing areas of electric utilities (section 212(g)), or be conditioned upon or require the transmission of electric energy directly to an ultimate consumer (section 212(h)).

[281] FERC Stats. & Regs. 32,514 at 33,083 (footnote omitted).

other person generating electric energy for sale for resale may request transmission services under section 211."[282]

Comments

PSNM believes that the NOPR properly defined customer eligibility. NIEP, on the other hand, believes that the proposed definition is too limited. It argues that the Commission should require public utilities to make transmission service available to all entities engaged in wholesale purchases or sales of power, not just to those "generating" power. Utility Working Group requests that the Commission clarify that eligibility is dependent not only on being the type of entity set forth in section 211, but on meeting the requirements of section 212(h) (Prohibition on Mandatory Retail Wheeling and Sham Wholesale Transactions) as well.[283]

We also received several comments related to the applicability of the rule to foreign entities. Canada states that the requirements for comparability and reciprocity should be implemented in a flexible manner to permit Canadian utilities to have fair and competitive access in the U.S. electricity market. Maritime requests that the Commission require Canadian utilities who wish to participate in the U.S. market to offer other utilities the same privileges they receive in the United States. Southwestern argues that transmission to a foreign country is in interstate commerce and that a utility should therefore accommodate this type of transmission request under its open access tariff. El Paso argues that the Commission does not have the authority to condition access to

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[282] Id. at 33,083 n.195.

[283] Section 212(h) (Prohibition on Mandatory Retail Wheeling and Sham Wholesale Transactions).

foreign countries, but states that if the Commission nevertheless exercises such authority it should do so on a case-by-case basis. Destec asserts that the posturing of Ontario Hydro before U.S. regulators pleading for open access and non-discriminatory transmission treatment--even for extra-territorial entities, should be met with a strong reply that such provisions should also be afforded transmission dependent entities on the Canadian side of the border. Ontario Hydro's aggressive pursuit of U.S. market opportunities while simultaneously blocking competitors through the control of their transmission assets can not be ignored.

Commission Conclusion

In the Final Rule pro forma tariff the Commission has modified the definition of "eligible customer" to address concerns that in some respects the NOPR definition was too limited and in other respects it was too broad. This includes amended language to clarify that any entity engaged in wholesale purchases or sales of energy, not just those "generating" electric power, is eligible. It also includes clarification that entities that would violate section 212(h) of the FPA (prohibition on Commission-mandated wheeling directly to an ultimate consumer and sham wholesale transactions) are not eligible. The language also has been modified to provide that foreign entities that otherwise meet the eligibility criteria may obtain transmission services. Further, it has been modified to provide for service to retail customers in circumstances that do not violate FPA section 212(h).[284]

Persons that would be eligible section 211 applicants also would be eligible under the open access tariffs. Section 211 applicants may be any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale.

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[284]We emphasize that any transmission customer must follow prudent utility practices so as to assure reliability.

Section 3(22) of the FPA, as amended by the Energy Policy Act, defines "electric utility" to mean any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

Thus, as we have previously noted, municipal utilities are electric utilities simply by the terms of the statute.[285] In addition, we have also found that cooperatives and marketers are electric utilities as defined in the FPA.[286] Other entities that fall within the definition include IOUs, IPPs, APPs, and QFs that sell electric energy.

We do not believe that entities that engage solely in brokering should be eligible. Such brokers do not take title to electricity and therefore do not engage in the sale of electric energy; nor do they generate electric energy for sale for resale.[287] Although such brokers are not eligible under the tariffs, they will be able to arrange deals because they will have access to the OASIS of all public utilities and will be able to solicit information from the relevant transmission service providers under the terms of the applicable tariffs.

We clarify that foreign entities that otherwise meet the eligibility criteria must be eligible to receive service under the non-discriminatory open access transmission tariffs.[288] We are

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[285]New Reporting Requirement Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibility Under the Energy Policy Act of 1992, and conforming and Other Changes to Form No. FERC-714, Order No. 558-A, 65 FERC 61,324 at 62,451 n.12 (1993).

[286] Order No. 558, FERC Stats. & Regs. 30,980 at 30,895-96, reh'g denied, 65 FERC 61,324 (1993) (cooperatives are electric utilities); AES Power, Inc., 69 FERC 61,345 at 62,297 (1995) (power marketer is an electric utility, i.e., a person "which sells electric energy").

[287]See, e.g., Citizens Energy Corporation, 35 FERC 61,198 at 61,452-53 (1986).

[288]In making this determination, we are not deciding whether these entities are eligible entities under section 211(a) of the FPA.

making this determination pursuant to our authority under section 206 of the FPA to remedy undue discrimination. As we explained in the NOPR, market power through the control of transmission can be used discriminatorily to block competition. Customers in the United States should not be denied access to cheaper supplies of electric energy, whether such electric energy is from a domestic source or a foreign source. By making non-discriminatory access available to foreign entities that otherwise meet the eligibility criteria, we are assuring that customers in the United States have access to as many potential suppliers as possible. This should result in increased competition and lead to customers paying the lowest possible prices for their electric energy needs. To the extent that such an entity obtains access, however, we emphasize that it would be subject to all of the terms and conditions of the applicable open access tariff, including the requirement that it provide reciprocal service.

Finally, we have reconsidered our NOPR position that would have limited eligibility to wholesale transmission customers. As we explained in the NOPR, the Commission's jurisdiction extends to all unbundled transmission in interstate commerce by public utilities. It is irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer. Thus, if a public utility voluntarily offers unbundled retail access in interstate commerce or a state retail access program results in unbundled retail access in interstate commerce by a public utility, the affected retail customer *must* obtain its unbundled transmission service under a non-discriminatory transmission tariff on file with the Commission. Though the Commission may approve a separate retail transmission tariff when some variation is necessary or appropriate to meet local concerns,[289] we generally see no reason why retail transmission tariffs necessarily must be different from wholesale transmission tariffs. For that reason, we anticipate that in many circumstances the same open access tariff that serves wholesale

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[289]See Section IV.I.

customers will be equally appropriate for retail transmission customers. Therefore, unless the Commission has specifically permitted a separate retail tariff, eligible customers under the Final Rule pro forma tariff must include unbundled retail customers.[280] We discuss this further in Section IV.I.

While the rates, terms, and conditions of all unbundled transmission service will be subject to a Commission-authorized tariff, we will, in appropriate circumstances, give deference to state recommendations regarding rates, terms, and conditions for retail transmission service or regarding the proper transmission cost allocation to be used between retail and wholesale customers when state recommendations are consistent with our open access policies. This is also discussed further in Section IV.I.

Moreover, we are mindful of the fact that we are precluded under section 212(h) from ordering or conditioning an order on a requirement to provide wheeling directly to an ultimate consumer or sham wholesale wheeling. We therefore clarify that our decision to eliminate the wholesale customer eligibility requirement does not constitute a *requirement* that a utility provide retail transmission service. Rather, we make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff unless we specifically approve other terms.

2. Service That Must be Provided by Transmission Provider

In the NOPR, the Commission proposed that a public utility must offer to provide any point-to-point or network transmission service whether or not the utility provides itself that service:

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[280]The Commission has no authority to order retail transmission directly to an ultimate consumer or to order "sham" wholesale transmission. See FPA section 212(h). However, if such access occurs voluntarily or as a result of a state program, the rates, terms, and conditions of the access are within our exclusive jurisdiction if the service is provided by a public utility.

The Commission therefore proposes that all public utilities must offer both firm and non-firm point-to-point transmission service and firm network transmission service on a non-discriminatory open access basis in accord with the proposed rule and the attached appendix tariffs. The Commission believes that a utility's tariff must offer to provide any point-to-point transmission service and network transmission service that customers need, even though the utility may not provide itself the specific service requested.[291]

Comments

EGA and SMUD agree that a transmission owner should offer any transmission service it is able to provide, even if it does not use the service itself.

Public Generating Pool, an association of consumer-owned electric utilities, appears concerned that the Commission may interpret comparability broadly to require a utility to offer the same service provided by another utility or to offer service generally available in a region. Thus, it recommends that a third party seeking more service than a utility provides itself be required to resort to the section 211 process.

Commission Conclusion

Initially, we note that, with the possible exception of small utilities (which may qualify for a waiver, see *infra*), we have seen no evidence that public utilities are incapable of reasonably providing the services required in the Final Rule pro forma tariff. Nor have we seen evidence that utilities able to provide these services to themselves are choosing to forego such services. In short, we are not convinced that there is an appreciable difference, if any, among the services required in the pro forma tariff, the services utilities are able to provide, and the services they actually provide themselves.

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[291]FERC Stats. & Regs. 32,514 at 33,079.

To the extent these services do differ, however, we explicitly adopt the proposal set forth in the NOPR. Thus, a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. Because a public

utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may not be using or providing that service today. Moreover, a public utility must offer these transmission services whether or not other utilities may be able to offer the same services and whether or not such services are generally available in the region (waiver of these requirements for small utilities is discussed in Section IV.K.2.).[292] However, if a customer seeks a customized service not offered in an open access tariff, a customer may, barring successful negotiation for such service, file a section 211 application.

3. Who Must Provide Non-Discriminatory Open Access Transmission

In the NOPR, the Commission proposed to require all "public utilities" owning and/or controlling facilities used for transmitting electric energy in interstate commerce to file open access transmission tariffs.[293] We explained that we could not require all "transmitting utilities" to file open access tariffs under sections 205 and 206 because we do not have jurisdiction over non-public utilities under these sections.

Comments

Several commenters argue that the open access requirement must be applied to non-jurisdictional utilities that own interstate transmission facilities.[294] Power Marketing Association

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[292]Requirements for ancillary services are discussed in Section IV.D.

[293]FERC Stats. & Regs. 32,514 at 33,049.

[294]E.g., Minnesota P&L, Power Marketing Association.

recognizes that this raises difficult legal issues and suggests that the Commission support legislation to expand the Commission's authority over non-jurisdictional utilities. Minnesota P&L argues that if the requirement is not applied to all entities that own transmission, jurisdictional and non-jurisdictional entities owning joint transmission facilities will be competitively disadvantaged due to unequal pricing. Union Electric argues that unless the requirement is extended to the 56 non-jurisdictional entities operating control areas, discrimination in the wholesale power markets will increase.

A number of municipal commenters assert that the NOPR overlooks transmission assets jointly owned by jurisdictional and non-jurisdictional utilities.[295] They argue that agreements regarding use of these assets often contain provisions prohibiting third-party power transfers. They further argue that such provisions should be nullified, and the joint owners should be required to develop equitable methodologies to allocate wheeling revenues among themselves.

Several cooperatives urge the Commission to clarify that contracts among their constituent cooperatives are not subject to any unbundling of existing contracts.

Commission Conclusion

Our authority under sections 205 and 206 of the FPA permits us to require only public utilities to file open access tariffs as a remedy for undue discrimination. We have no authority under those sections of the FPA to require non-public utilities to file tariffs with the Commission.

However, we are concerned that if non-public utilities do not provide access, there will remain a patchwork of "open" and "closed" transmission systems and the potential for distortions

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[295]E.g., Springfield.

in wholesale bulk power markets. We believe that certain mechanisms exist that will help to alleviate these problems.

First, as we explained in the NOPR, broad application of section 211 will provide wider access to bulk power markets.[296] Under section 211, eligible entities may seek transmission service from "transmitting utilities," which section 3(23) of the FPA defines as "any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale." We believe that section 211 provides us with authority to require the same *quality* of transmission service as sections 205 and 206, though the procedural path is more cumbersome. Thus, section 211 provides access to transmission systems owned or operated by non-public utilities.[297]

Second, as we explained in the NOPR, our reciprocity requirement is designed to provide the widest possible use of the nationwide transmission grid:

> The purpose of this provision is to ensure that a public utility offering transmission access to others can obtain similar service from its transmission customers. It is important that public utilities that are required to have on file tariffs be able to obtain service from transmitting utilities that are not public utilities, such as municipal power authorities or the federal power marketing administrations that receive transmission service under a public utility's tariff.[298]

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[296]FERC Stats. & Regs. 32,514 at 33,050 and 33,092-93.

[297]As discussed in the NOPR, sections 211 and 212 require that applicants specify only rates, terms, and conditions of service, not specify transactions. Thus, applicants can file requests for tariffs to accommodate future, currently unspecified transactions, similar to the open access tariffs required by this Rule.

[298]FERC Stats. & Regs. 32,514 at 33,089.

Finally, again as we explained in the NOPR, the formation of RTGs should speed the development of competitive markets and involve more non-public utilities in the provision of non-discriminatory open access transmission.[209] In approving RTGs, our policy has been to require all members, whether or not they are public utilities, to offer comparable transmission services at least to other members.

We recognize that these solutions are not perfect. However, given the difficulties inherent in the statutory scheme, we believe they will go a long way toward effectuating transmission access by non-public utilities.

One further issue involving non-public utilities concerns jointly owned transmission facilities. We will not allow public utilities that jointly own interstate transmission facilities with non-jurisdictional entities to escape the requirements of open access. We will require each public utility that owns interstate transmission facilities jointly with a non-jurisdictional entity to offer service over its share of the joint facilities, even if the joint ownership contract prohibits service to third parties. We urge such public utilities to seek mutually agreeable revisions to their agreements to permit third-party access over all, or at least their share, of the facilities. For those joint ownership arrangements that include restrictions on the usage of jointly owned transmission facilities by third parties, we will require the public utilities, in a section 206 compliance filing, to file with the Commission, by December 31, 1996, a proposed revision (mutually agreeable or unilateral) to its contract with the non-jurisdictional owner(s). This revision must be designed at a minimum to permit third parties to use the public utility's share of the joint facilities in accordance with this Rule and must provide for any needed cost allocation procedures between the public utility and the non-jurisdictional owner(s).

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[209] Id. at 33,095.

4. Reservation of Transmission Capacity by Transmission Customers

In the NOPR, the Commission set forth the information that a requester of transmission service would have to submit with a service request. We recognized that there may have to be a limit, for competitive reasons, on the information required, but also recognized the need to assure that no customer would reserve scarce capacity and then hold it without using it.[300] To avoid forcing transmission customers to reveal unnecessary details of their purchase or sales transactions, the Commission discussed several less restrictive options: (1) Allow the transmission provider to use or sell the capacity while it is unused, (2) have a pool that clears the short-term market, and (3) require the customer to begin using the capacity within some specified period or lose its reservation rights. The Commission requested comments on these and other possible approaches.

Comments

Unused or Unneeded Transmission Capacity

Many commenters recommend a use-it-or-lose-it rule (i.e., a transmission customer must use its reserved transmission capacity or lose its rights to that capacity).[301] Several commenters also recommend a number of restrictions on capacity reservations to reduce incentives to hoard or to cherry-pick (request to reserve firm capacity only during peak hours of peak seasons) existing transmission capacity. These include: (1) Allow requesters to reserve a place in the queue with a right of first refusal over later competing requests; (2) impose a take-or-pay charge on reservations and deny reservation holders the right to revenue sharing if they do not schedule or assign their rights; (3) limit the time period for reservations; (4) limit how far in advance reservations may be made for both non-firm and

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[300] Id. at 33,090.

[301] E.g., Consumers Power, Northern States Power, PacifiCorp, Oklahoma G&E, Allegheny Power, ELCON, Public Service Co of CO.

firm services; (5) maintain a price cap on the resale of transmission; (6) require multi-year reservations to be for sequential periods; and (7) require a nonrefundable fee for advance reservations of service.[802] Southwestern suggests that transmission tariffs include a provision that prevents transmission customers and the transmission provider from reserving and tying up firm transmission capacity for speculative wholesale transactions.[803]

On the other hand, PSNM believes that a use-it-or-lose-it approach is inappropriate because any prudent utility that has reserved capacity would seek to sell the service it is not using so as to recover some portion of its fixed costs. Wisconsin P&L argues that a use-it-or-lose-it approach would not work, would be difficult to administer, and may be anticompetitive.[804] Central Illinois Public Service asserts that a reservation holder has little incentive to hoard capacity because other customers can use the capacity on a non-firm basis during times when a reservation holder does not schedule power. It warns that giving the transmission operator the ability to schedule unused capacity may result in undue influence and the exercise of market power. CA Energy Com maintains that, while reassignment would help prevent hoarding, it would not assure efficient use of the full transmission network.

Use of Pooling Arrangements To Prevent Improper Reservations

Allegheny Power contends that a pooling arrangement could provide an incentive to hoarders to release capacity during a shortage. It suggests that capacity could be auctioned within a

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[802]E.g., Northern States Power, VEPCO, Utilities For Improved Transition, PacifiCorp, Arizona Public Service, Dairyland, Montaup, Illinois Power, South Carolina E&G, Florida Power Corp, KU.

[803]See also NRECA.

[804]Wisconsin P&L notes, however, that a possible exception exists where a user could block the efficient transfer of power and then market its own power at a premium price.

pool of available capacity. However, it acknowledges that an auction would be tantamount to allowing the network owner to sell transmission service at unregulated rates.

PacifiCorp does not believe that a pooling arrangement would prevent capacity hoarding unless nonsequential reservations are prohibited. ELCON contends that a use-it-or-lose-it rule would be fairer and more effective than pooling.

Commission Conclusion

Upon further consideration, we conclude that firm transmission customers, including network customers, should not lose their rights to firm capacity simply because they do not use that capacity for certain periods of time. Firm transmission customers that have reserved capacity and paid a reservation charge generally do not use the entire amount of reserved capacity at all times. This does not mean, however, that they must permanently return the unused amount to the utility. In the absence of evidence of hoarding or other anticompetitive practices, we will not limit the amount of transmission capacity that a customer may reserve. Firm transmission customers are in the best position to know the levels of electric energy they will be transmitting and the level of flexibility they need in carrying out their transmission activities. Indeed, when they are not using their reserved capacity, firm transmission customers remain obligated to pay the utility a reservation charge that covers all of the utility's fixed costs associated with the reserved capacity.[305]

Moreover, the possibility that a customer will reserve capacity and then hold it without using or reassigning it is mitigated because the utility is free to schedule and sell any unscheduled firm point-to-point transmission capacity on a non-firm basis to any entity eligible to receive such service under the utility's tariff. We also note that it is in the economic self

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[305] A reservation charge would assure that the utility fully recovers its fixed costs associated with the transmission customer's reserved transmission capacity.

interest of reservation holders to make available unused capacity to the market.[306]

We recognize that situations could arise in which a customer unlawfully withholds capacity. That is, a transmission customer could retain capacity in a way that could have an anticompetitive effect. For example, a transmission customer may reserve certain capacity simply to prevent everyone else from using it and to make its own generation the only alternative available to the market. However, as described above, we believe that the incentives are such that parties are more likely to release unneeded capacity and that a generic remedy is therefore unnecessary. Any substantial allegations that indicate that a transmission customer is withholding scarce capacity in a way that has an anticompetitive effect would be addressed under section 206. If we found such allegations to be true, we could order the customer to return the capacity reservation right to the transmission operator. This approach should allay concerns that a customer may reserve scarce capacity and not use it, without forcing customers to demonstrate need or to reveal details of individual transactions.

5. Reservation of Transmission Capacity for Future Use by Utility

Comments

EEI and many IOUs argue that native load and network transmission customers should have first priority to existing capacity for their reasonably forecasted load requirements because that capacity was constructed to provide service to them and was paid for by them.[307] EEI contends that such

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[306] See Section IV.C.6.

[307] E.g., NYPP, Public Service E&G, Sierra Pacific Power, Ohio Edison. Sierra Pacific Power asserts that a utility should be permitted to retain capacity for native load use over the pertinent planning period. El Paso adds that the Commission should allow utilities the opportunity to reserve capacity for anticipated uses that, although not firm, are necessary to maintain reliability.

priority ensures equity and comparability based on past and future cost responsibility for the system. Similarly, Florida Power Corp and PECO contend that third-party customers should not be allowed to use transmission capacity that native load customers would grow into within a reasonable planning horizon.

Other commenters disagree, asserting that available transmission capacity must be determined in the same manner for all customers and that utilities should not be permitted to reserve capacity for their own uses.[308] NIEP argues that utilities should not be permitted to lock up available transmission capacity over valuable transmission paths and then require transmission requesters to pay for the cost of incremental transmission upgrades. This would let the utility avoid incremental transmission charges on its system. Oklahoma G&E argues that existing available transmission capacity should be made available until it is needed for native load growth. Utilicorp states that transmission owners should not be permitted to set aside capacity for sales or purchases of economy energy. CCEM argues that the centerpiece of comparability is that all transmission customers, including the merchant operations of the transmission owner, take service from available capacity pursuant to the same tariffs. CCEM adds that allowing utilities to reserve capacity based on forecasted retail and network loads creates an incentive for them to over- forecast their load to the detriment of all others. NRECA suggests that the need to maintain reliability should not perpetuate transmission providers' preferential treatment of their own transactions. It also recommends that, during periods when facilities are constrained, access be allocated based on a combination of past actual use and planned future use.

Commission Conclusion

We conclude that public utilities may reserve existing transmission capacity needed for native load growth and

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[308] E.g., NIEP, CCEM, Conservation Law Foundation.

network transmission customer load growth reasonably forecasted within the utility's current planning horizon. However, any capacity that a public utility reserves for future growth, but is not currently needed, must be posted on the OASIS and made available to others through the capacity reassignment requirements, until such time as it is actually needed and used.

In response to arguments raised by several commenters that existing requirements customers should have future rights to existing capacity beyond the terms of their contracts because of their historical use, as discussed previously, we believe existing customers should have a right of first refusal to capacity they previously used, if they are willing to match the rate offered by another potential customer, up to the transmission provider's maximum filed transmission rate at that time, and to accept a contract term at least as long as that offered by another potential customer.[409]

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G. Pro Forma Tariff

In the NOPR, the Commission stated that--all utilities use their own systems in two basic ways: to provide themselves point-to-point transmission service that supports coordination sales, and to provide themselves network transmission service that supports the economic dispatch of their own generation units and purchased power resources (integrating their resources to meet their internal loads).[426]

Accordingly, the Commission proposed two pro forma tariffs in Appendices B and C of the NOPR: One for point-to-point service and one for network service. Our goal was to encourage the development of competitive bulk power markets by ensuring that all participants would be able to secure

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[409]See Section IV.A.5.

[426]FERC Stats. & Regs. 32,514 at 33,079.

transmission services on a non-discriminatory basis. We attempted in the NOPR pro forma tariffs to articulate the minimally acceptable terms and conditions of service for point-to-point and network transmission service that were required to ensure non-discriminatory transmission service.[427] We explained that, for the most part, specific pricing provisions were omitted. We asked for comments on whether these tariffs provided a good basis for defining the minimum acceptable non-price terms and conditions of service.[428]

Subsequently, in a June 28, 1995 order, we encouraged public utilities to file open access transmission tariffs as soon as possible.[429] Tariffs with terms and conditions of service substantively similar to the NOPR pro forma tariffs would become effective without a refund condition, assuming there were no other concerns, e.g., rate issues. We also indicated that these tariffs would be subject to revision based on the Final Rule.

Unified Pro Forma Tariff

The Commission received many comments on both the point-to-point and network tariffs. Many commenters suggested improvements to the proposed tariffs. Others took issue with how to reconcile various aspects of service under the two tariffs (e.g., cost allocation, service priority, customer rights and obligations). As discussed below, the Commission has attempted to address these concerns in developing tariff requirements for the Final Rule. Importantly, while the Commission has retained point-to-point transmission service and network transmission service as distinct services, the requirements for the two services are now in a single pro forma

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[427]Id. at 33,092.

[428]On October 27, 1995, the Commission=s staff sponsored a technical conference on the pro forma tariffs.

[429]American Electric Power Service Corporation, et al., 71 FERC 61,393, modified, 72 FERC 61,287 (1995).

tariff.[430] The Final Rule pro forma tariff eliminates many of the differences between the two NOPR pro forma tariffs, provides a unified set of definitions, and consolidates certain common requirements such as the obligation to provide ancillary services. The general terms and conditions of transmission service specified in the Final Rule pro forma tariff should be familiar to all utilities, particularly those that have voluntarily filed open access tariffs based on the NOPR pro forma tariffs.

The Commission believes that the modified, single pro forma tariff, in conjunction with the other requirements, is sufficient to remedy undue discrimination in the provision of transmission services. However, we note that in an accompanying notice of proposed rulemaking in Docket No. RM96-11- 000, we are seeking comments on whether a different form of open access tariff--one based solely on a capacity reservation system--might better accommodate competitive changes occurring in the industry while ensuring that all wholesale transmission service is provided in a fair and non-discriminatory manner.

We address below the comments received on the NOPR tariff and the specific modifications we have made in the Final Rule pro forma tariff.

1. Tariff Provisions That Affect The Pricing Mechanism

a. Non-Price Terms and Conditions

Comments

Utilities For Improved Transition argues that any generic imposition of detailed tariffs on the electric industry will stifle the evolution of the industry. Rather, it asserts, utilities that supply transmission service should be permitted to apply general principles of comparability in their company-specific

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[430]The Final Rule pro forma tariff is attached as Appendix D.

tariffs, using terms and conditions of service based on their own particular circumstances and those of their customers.

Utility Working Group wants the final rule to allow utilities to depart from the pricing method implicitly contained in the NOPR pro forma tariffs. It argues that the final rule should recognize that some terms and conditions may not make sense in the context of innovative pricing proposals.

DOE thinks that it is proper to base the tariffs on a familiar and simple pricing method. However, DOE suggests that, in the future, the Commission carefully assess the workability of the contract path model in a competitive bulk power market. DOE suggests that spot or real-time pricing should be considered.

Numerous commenters contend that the NOPR pro forma tariffs are based upon the contract path, embedded cost methodology. According to EEI and other IOU commenters, conforming changes may be needed to various terms and conditions of the tariffs to implement pricing methodologies that are not based upon contract path. These commenters argue that any flow-based model would necessitate different non-price terms and conditions. The commenters generally recognize the technical difficulties of implementing a flow-based model.[431] These commenters assert that the NOPR pro forma tariffs, as written, are not independent of pricing.

EGA criticizes the assumption underlying the contract path approach, i.e., that the capacities of individual transmission paths can be determined independently and made available to third parties. EGA notes that, in light of the competitive implications associated with transmission pricing, some utilities may propose other non-price terms and conditions suitable for other pricing methods, including power-flow-based tariffs. EGA expresses concern that the pro forma tariffs will be the only type of tariff allowed. EGA believes that the Commission

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[431] Additional comments concerning transition to flow-based pricing are summarized in Section IV.A.6.

should follow its transmission pricing policy guidelines and not impose a special burden on parties proposing tariffs that differ from the final rule pro forma tariffs, including non-price terms that support alternative pricing methods.

Some commenters also interpret the lack of reference to opportunity cost and incremental cost in the NOPR pro forma tariffs as a rejection of their use.[432]

Commission Conclusion

We agree that non-price terms and conditions cannot be designed independent of pricing and cost recovery. As discussed in detail below, the Final Rule pro forma tariff is intended to initiate open access, with non-price terms and conditions based on the contract path model of power flows and embedded cost ratemaking. It is designed based on the practices and procedures currently used by virtually all public utilities and complements the large number of tariffs already filed with the Commission. The Final Rule pro forma tariff is not intended to signal a preference for contract path/embedded cost pricing for the future. We recognize that the industry, in response to changes in institutions, competitive pressure, and technological innovations, is evolving rapidly. For example, various forms of flow-based pricing are beginning to be considered in conjunction with electronic transmission information systems. We seek to encourage this process and will in the future entertain non-discriminatory tariff innovations to accommodate new pricing proposals.[433]

In response to various comments, we are revising certain non-price terms and conditions where suggested changes either improve the tariff services or reconcile tariff inconsistencies. The nature of these tariff revisions does not appear to have

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[432]E.g., BPA, Utilities For Improved Transition, PG&E, Duke.

[433]We further clarify that, contrary to some commenters' interpretation, the Final Rule pro forma tariff is in no way a rejection of opportunity or incremental cost pricing.

serious cost consequences. The mandated changes are generally compatible with the rate proposals already filed by many public utilities. As discussed in Section IV.H., those utilities will not be required to file corresponding rate changes due to our mandated tariff changes to non-price terms and conditions, although they will be permitted to do so.

The Final Rule pro forma tariff includes specific terms and conditions rather than general principles. By initially requiring a standardized tariff,[434] we intend to foster broad access across multiple systems under standardized terms and conditions. However, in response to concerns raised by certain commenters, the tariff provides for certain deviations where it can be demonstrated that unique practices in a geographic region require modifications to the Final Rule pro forma tariff provisions. Accordingly, where applicable, the tariff permits the use of alternative non-price terms or conditions that are reasonable, generally accepted in the region, and consistently adhered to by the transmission provider.

Finally, we will allow utilities to propose a single cost allocation method for network and point-to-point transmission services. These principles, as well as other modifications and clarifications to the NOPR pro forma tariffs, are discussed in detail below.

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2. Priority for Obtaining Service

Comments

The term "priority" is used in the comments in several senses. The intent of the comment depends on which kind of "priority" is intended. In general, there are comments about the order in which parties can obtain new service, which we call "reservation priority," and there are comments about the order

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[434] As noted in Section IV.H., public utilities may propose variations that are consistent with or superior to the terms and conditions in the Final Rule pro forma tariff.

in which parties lose service they already have, which we call "curtailment priority." Commenters may establish different reservation priorities for various services, such as network, off-system sales, firm, ability to reserve a portion of new transmission capacity to be constructed, and so on. Curtailment priorities also differ with the type of service. However, many commenters assert that certain parties should or should not have "priority" without distinguishing the kind of priority or type of service for which priority is intended.

a. Reservation Priority for Existing Firm Service Customers

Comments

Many IOUs, state commissions, and cooperatives strongly believe that native load should have priority to reserve transmission capacity under the tariffs.

EEI suggests that existing and future allocations of transmission capacity must be based on proper transmission pricing or, in its absence, priority of service. According to EEI, retail and existing wholesale requirements service should have the highest priority for use of transmission capacity, followed by long-term point-to-point service. Dayton P&L supports a continued preference for native load growth because native load customers have borne the majority of the costs of the transmission system. Detroit Edison, EEI, and Florida Power Corp claim that, because native load and network customers pay higher rates during all hours, such customers should have higher priority for service requests than others requesting transmission service. These commenters also claim that the transmission provider should be able to reserve firm capacity for native load and network service customers.

Similarly, NARUC wants wholesale and retail native load customers to be held harmless from functional unbundling of wholesale transmission services. Because these customers have borne the vast majority of the costs of the utility's transmission facilities, NARUC argues that priority of service, quality of service, and allocation of joint and common costs to native load

customers should not be affected by the transition to an open access transmission regime.

PA Com does not share the Commission's concern that a transmission provider may discriminate against a third party transmission customer vis-a-vis native load. It finds nothing impermissible in this sort of discrimination, arguing that the interconnected system was financed by, designed for, and built to serve native load.

NRECA explains that most transmission customers that seek network service will already be receiving similar service (albeit in a bundled form) from their transmission providers. It argues that these customers should receive the same priority of service as the transmission provider's native load customers for as long as they continue to take network service, whether under a current bundled wholesale supply contract, a private transmission contract, or a network tariff.[455]

East Kentucky requests that the final rule clarify that member distribution cooperatives of G&Ts will have priority over third parties in the use of the G&T's existing transmission facilities. TVA comments that native load customers and emergency service to neighboring systems should have a higher service priority than transmission services sold to third parties (where an alternative power supply is available to the third party).

Commission Conclusion

We reiterate that we are not requiring the transmission provider to unbundle transmission service to its retail native load nor are we requiring that bundled retail service be taken under the terms of the Final Rule pro forma tariff. However, the amount of transmission capacity available to wholesale and unbundled retail customers under the Final Rule pro forma tariff is clearly affected by the amount of transmission capacity that the transmission provider reserves for the use of its native

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[455]See also American Forest & Paper, AMP-Ohio.

load customers and the future load growth of those customers. The transmission provider may reserve in its calculation of ATC transmission capacity necessary to accommodate native load growth reasonably forecasted in its planning horizon. However, the transmission provider is obligated to provide transmission service to others under the Final Rule pro forma tariff out of capacity reserved for native load growth up to the time the capacity is actually needed for such future needs. Furthermore, as we explained previously, while existing wholesale customers do not have any ownership-like rights to the capacity they used during the term of their contract, they will have a right of first refusal to that capacity after the expiration of their contracts or when their contracts become subject to renewal or rollover.[456]

b. Reservation Priority for Firm Point-to-Point and Network Service

Comments

A number of commenters argue that all firm service should not be treated equally. These commenters argue that the price of the service should determine the priority that the service receives. A large number of IOUs and potential network customers (existing requirements customers) argue that in light of the pricing implicit in the NOPR, (i.e., 12 CP for network versus annual system peak for point-to-point) network service should have priority over point-to- point service (because, all other things being equal, the price for network service will be higher).

BG&E believes that a customer receiving service priority equal to native load and network customers should pay comparable rates. Thus, BG&E argues that either flexible firm point-to point service should be priced the same as network service, or point-to-point service should have a lesser priority

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[456]See discussion in Section IV.A.5.

than native load and network service customers if point-to-point service is priced lower than network service.

DE Muni believes that native load and network customers must have priority access to interfaces (particularly where they are constrained) after system reliability concerns have been satisfied. The same argument is advanced by commenters concerning long-term service versus short-term service. Public Generating Pool argues that long-term service should always have priority over short-term service because long-term customers contribute more towards fixed- cost recovery than do short-term customers.

Cajun objects to having its service and service to its customers, which it characterizes as network service, receive the same priority as firm point-to-point service customers who take service for periods as short as one hour. Cajun points out that it, as well as other network and native load customers, have been paying and will be paying for the transmission facilities in place to serve their needs for many years. According to Cajun, the transient firm point-to-point customer should not have equal standing. Cajun suggests, however, that a long-term firm point-to-point customer taking service for ten years or more should have service priority equal to native load and network service customers.

SC Public Service Authority argues that the availability of short-term firm service with a priority equal to long-term service would provide a means for short-term customers to obtain the advantages of long-term firm service at a much lower total cost. As a result, it argues that a few point-to-point customers would opt for long-term firm service, and the burden of the residual costs of the transmission system would fall on network customers.

EEI claims that priority for point-to-point service should be on a continuum of firmness, with reservation (as well as curtailment) priority based upon duration of service and specific negotiated terms. EEI proposes that the point-to-point tariff be modified to provide a first-tier category of flexible point-to-

point transmission service that is comparable in priority, price, length, and terms of service to network service. EEI believes that this modification will resolve the problems that are associated with establishing priorities between network service and point-to-point service if the Commission retains different CP cost allocation methods for each service.

On the other hand, CCEM, a group of power marketers, supports the concept that all firm service should be treated equally, regardless of the term or the nature of service.

Commission Conclusion

An essential element of non-discriminatory transmission access is the right of transmission customers to reserve and purchase transmission service that is of the same quality as that used by the transmission provider in serving its wholesale requirements customers and retail load. Thus, we reject the proposal of some commenters that transmission providers need not provide firm point-to- point service that is of the same "firmness" as the transmission provider's service to native load. However, the fact that both network service and point- to-point service are provided on an equally firm basis does not mean that both types of service must be priced or reserved in the same manner.

The comments about reservation priorities for firm services boil down to two concerns. First, due to the differences in pricing firm point-to-point service and network service implicit in the NOPR (i.e., twelve-monthly CP pricing for network versus annual system peak for point-to-point), some commenters believe that network service should have priority over point-to-point service. Second, some commenters maintain that according firm, short-term point-to-point service a priority equal to long-term service provides a means for short-term customers to avoid making a fair contribution to the long-term costs of the system.

With respect to the first concern, we have eliminated the differences in pricing by permitting utilities to adopt point-to-

point reservations as the customer load. As discussed above, for purposes of the Final Rule pro forma tariff, utilities are free to propose a single cost allocation method for the two services.

The second area of concern arises because of the first-come first-served reservation priority in the NOPR point-to-point tariff. The Commission recognizes that the tariffs, as proposed in the NOPR, provide the opportunity for a customer to reserve certain valuable rights (e.g., the right to short- term firm service during peak periods) while avoiding in part the long-term costs of the system (perhaps by relying on non-firm service during lengthy off- peak periods when there is a substantially reduced chance of interruption). However, the Commission has a countervailing concern that the transmission provider should not be able to withhold valuable transmission capacity from potential customers if that capacity is not being used by those who are paying for the long-term costs of the system.

Accordingly, the Final Rule pro forma tariff provides a mechanism to address this concern while safeguarding the rights of potential customers to obtain access to unused capacity. The tariff provides that reservations for short- term firm point-to-point service (less than one year) will be conditional until one day before the commencement of daily service, one week before the commencement of weekly service, and one month before the commencement of monthly service. These conditional reservations may be displaced by competing requests for longer-term firm point-to-point service. For example, a reservation for daily firm point-to-point service could be displaced by a request for weekly firm point-to-point service during an overlapping period. Before the applicable reservation deadline, a holder of a conditional firm point-to-point reservation would have the right of first refusal to match any longer-term firm point-to-point reservation before being displaced. After the deadline, the reservation becomes unconditional, and the service would be entitled to the same

priorities as any long-term point-to-point or network firm service.[457]

The Final Rule pro forma tariff does not propose point-to-point or network service with various degrees of firmness beyond the simple categories of firm and non-firm. When a customer requests firm transmission service, reservation priorities are established based first on availability, and in the event the system is constrained, based on duration of the underlying firm service request; customers may choose the "firmness" of service they want by electing to take non-firm service, or by reserving and paying for firm service. We have not included any degrees of firmness in the Final Rule pro forma tariff because having intermediate categories of firmness under point-to-point or network service would, we believe, unnecessarily complicate the priority system. However, utilities are free to propose and fully support different reservation priority provisions for firm service in subsequent rate filings as long as those provisions are not unduly discriminatory, fully comply with the principles of comparability, and are priced appropriately.

* * *

3. Curtailment Provisions

a. Pro-Rata Curtailment Provisions

Comments

A large number of IOUs that are control area operators argue for discretion to curtail the transaction that most effectively relieves the constraint, in lieu of mandatory pro-rata curtailments, which they argue are inappropriate and not cost effective.

Other commenters that do not support pro-rata curtailment argue that preference should be given to native load or existing

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[457]The service itself, as opposed to reservations, is subject to the curtailment provisions discussed below.

customers because these customers have paid the majority of the costs of the transmission system. A large number of customers note that their existing contracts contain "enhanced" curtailment priorities (i.e., service to others will be curtailed before service to customers with such curtailment priority) due to the large capital outlays made by them in connection with their service.[459]

Public Generating Pool believes that the proposed curtailment provisions may not be flexible enough for transactions in the Northwest. It argues that hydro spill should be avoided, and suggests that transactions from federal and/or non-federal hydroelectric generation facilities should not be curtailed pro rata with other transactions that do not rely on such facilities. Public Generating Pool urges that regional agreements (e.g., regional transmission group agreements) that would achieve this goal should be given deference.

Other commenters support pro-rata curtailments for firm service.[460] PSNM states that this has been its operating practice in the past, and PSNM expects to continue such an approach in the future.

Power marketer commenters generally support the pro-rata curtailment adding that a standardized curtailment priority applied nationally would provide greater open access and eliminate discriminatory curtailments.

Commenting on a related subject, EEI maintains that the network tariff provision for termination of service in the event a customer fails to curtail load[461] may not be realistic for service to a Transmission Dependent Utility. EEI suggests that the Commission supplement this provision with a substantial penalty provision, coupled with an indemnification requirement.

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[459]E.g., TANC, Turlock, SMUD.

[460]E.g., PSNM and Nebraska Public Power District.

[461]Proposed Pro Forma Network tariff section 9.7--System Reliability.

Commission Conclusion

It was not our intent in the NOPR to require all transactions to be curtailed on a pro-rata basis regardless of whether the transaction relieves a constraint. We intended to permit curtailments of transactions that substantially relieve a constraint.[462] We intended and continue to believe that curtailment on a pro-rata basis is appropriate for curtailing the transactions that substantially relieve the constraint. In order to allay the concerns of the commenters addressing this issue, we are clarifying the curtailment provision of the tariff to explicitly allow the transmission provider discretion to curtail the services, whether firm or non-firm, that substantially relieve the constraint. Of course, any curtailment must be made on a non-discriminatory basis, including curtailment of the transmission provider's own use of the transmission system. Customers that believe the curtailment policy is administered unfairly may file a section 206 complaint at the Commission.

Concerning the request of certain Pacific Northwest commenters, we would consider granting deference to an alternative curtailment method to avoid hydro spill if such a regional practice is generally accepted and adhered to across the region, as discussed further in Section IV.K.

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[462]The Final Rule pro forma tariff contains language allowing the transmission provider the discretion to interrupt firm transmission service in an emergency or other unforeseen condition in a manner suggested by these commenters. Section 11.6, Curtailment of Firm Service, of the Final Rule pro forma tariff provides:

> However, the Transmission Provider reserves the right to interrupt, in whole or in part, firm Transmission Service provided under this Tariff when, in the Transmission Provider's sole discretion, an emergency or other unforeseen condition impairs or degrades the reliability of its transmission system.
>
> The reference to curtailments being allocated on a proportional (pro rata) basis addresses situations where multiple transactions could be curtailed to relieve a constraint.

Finally, we agree with EEI's observation that terminating network service under the tariff to a transmission dependent utility that fails to curtail load as required may not be appropriate. As a result, we clarify that under network and point-to-point service, the transmission provider may propose a rate treatment (penalty provision) to apply in the event a customer fails to curtail load as required under the Final Rule pro forma tariff. Such proposals will be evaluated on a case-by-case basis on compliance.

b. Curtailment Provisions for Non-Firm Service

Comments

A number of commenters seek clarification of the curtailment provision for non-firm service under the two tariffs. They note that economy purchases by the network customer are accorded a higher curtailment priority than non-firm service under the point-to-point tariff. However, under the point-to-point tariff there is no acknowledgement of this higher priority for network service. Curtailments for non-firm transmission service under the point-to-point tariff are simply based upon duration of service, without reference to a higher priority for network economy purchases.

A number of commenters, including Industrial Energy Applications, suggest that a price-based curtailment queue for non-firm transmission will facilitate economy energy deals in highly competitive wholesale power supply markets and allow the parties to directly address delivery risk through the pricing mechanism.

Blue Ridge argues that the final rule should provide equal curtailment priority for all types of non-firm transmission service. Utilities For Improved Transition argues that network customers should be able to transmit non-firm power imports under the network tariff with the same curtailment priority that is assigned to all other firm network uses of the transmission system.

A number of commenters note that the tariffs allow non-firm service to be interrupted only for emergency or reliability reasons or to provide firm service. These commenters contend that, under this requirement, curtailment of non-firm service is unlikely.[463] As a result, they believe that non-firm service is elevated to firm service. To remedy this situation, these commenters argue that transmission providers should have the ability to curtail non-firm service for any economic reason.

Commission Conclusion

We have clarified in the Final Rule pro forma tariff that a network customer's economy purchases have a higher curtailment priority than non-firm point-to- point transmission service.

A higher curtailment priority should be provided to network economy energy purchases for the reasons stated in *AES Power, Inc.*[464] In that case, we recognized that the network transmission customer has already "paid" for the transmission of its economy purchases (i.e., transmission that is used to substitute one resource for another on an as available basis) through its payment of a load ratio share of the system.

Many commenters oppose the point-to-point service provision allowing non-firm service to be interrupted only for emergency or reliability reasons or to provide firm service. Upon further consideration, we agree that this provision is too narrow. Accordingly, the Final Rule pro forma tariff is revised to allow the transmission provider to curtail non-firm service for reliability reasons or economic reasons (i.e., in order to accommodate (1) a request for firm transmission service, (2) a request for non-firm service of greater duration, (3) a request for non-firm transmission service of equal duration with a

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[463] E.g., Florida Power & Light Company, Southern California Edison Company.

[464] 69 FERC 61,145 at 62,300 (1994) (proposed order), 74 FERC 61,220 (1996) (final order).

higher price, or (4) transmission service for economy purchases by network customers from non-designated resources.). However, all curtailments must continue to be made on a non-discriminatory basis including curtailments of the transmission provider's own non-firm uses of the transmission system under the tariff. A firm point-to-point customer's use of transmission service at secondary points of receipt and delivery will continue to have the lowest curtailment priority.

* * *

II. Point-To-Point Transmission Service

Preamble

The Transmission Provider will provide Firm and Non-Firm Point-To-Point Transmission Service pursuant to the applicable terms and conditions of this Tariff. Point-To-Point Transmission Service is for the receipt of capacity and energy at designated Point(s) of Receipt and the transmission of such capacity and energy to designated Point(s) of Delivery.

13 Nature of Firm Point-To-Point Transmission Service

13.1 Term: The minimum term of Firm Point-To-Point Transmission Service shall be one day and the maximum term shall be specified in the Service Agreement.

13.2 Reservation Priority: Long-Term Firm Point-To-Point Transmission Service shall be available on a first-come, first-served basis i.e., in the chronological sequence in which each Transmission Customer has reserved service. Reservations for Short-Term Firm Point-To-Point Transmission Service will be conditional based upon the length of the requested transaction. If the Transmission System becomes oversubscribed, requests for longer term service may preempt requests for shorter term service up to the following deadlines: one day before the commencement of daily service, one week before the commencement of weekly service, and one month before the commencement of monthly service. Before the deadline, if available transmission capability is insufficient to satisfy all

Applications, an Eligible Customer with a reservation for shorter term service has the right of first refusal to match any longer term reservation before losing its reservation priority. After the deadline, service will commence pursuant to the terms of Part II of the Tariff. Firm Point-To-Point Transmission Service will always have a reservation priority over Non-Firm Point-To-Point Transmission Service under the Tariff. All Long-Term Firm Point-To-Point Transmission Service will have equal reservation priority with Native Load Customers and Network Customers. Reservation priorities for existing firm service customers are provided in Section 2.2.

13.3 Use of Firm Transmission Service by the Transmission Provider: The Transmission Provider will be subject to the rates, terms and conditions of Part II of the Tariff when making Third-Party Sales under (i) agreements executed on or after July 9, 1996, or (ii) agreements executed prior to the aforementioned date that the Commission requires to be unbundled, by the date specified by the Commission. The Transmission Provider will maintain separate accounting, pursuant to Section 8, for any use of the Point-To-Point Transmission Service to make Third-Party Sales.

13.4 Service Agreements: The Transmission Provider shall offer a standard form Firm Point-To-Point Transmission Service Agreement (Attachment A) to an Eligible Customer when it submits a Completed Application for Firm Point-To-Point Transmission Service. Executed Service Agreements that contain the information required under the Tariff shall be filed with the Commission in compliance with applicable Commission regulations.

13.5 Transmission Customer Obligations for Facility Additions or Redispatch Costs: In cases where the Transmission Provider determines that the Transmission System is not capable of providing Firm Point-To-Point Transmission Service without (1) degrading or impairing the reliability of service to Native Load Customers, Network Customers and other Transmission Customers taking Firm

Point-To-Point Transmission Service, or (2) interfering with the Transmission Provider's ability to meet prior firm contractual commitments to others, the Transmission Provider will be obligated to expand or upgrade its Transmission System pursuant to the terms of Section 15.4. The Transmission Customer must agree to compensate the Transmission Provider for any necessary transmission facility additions pursuant to the terms of Section 27. To the extent the Transmission Provider can relieve any system constraint more economically by redispatching the Transmission Provider's resources than through constructing Network Upgrades, it shall do so, provided that the Eligible Customer agrees to compensate the Transmission Provider pursuant to the terms of Section 27. Any redispatch, Network Upgrade or Direct Assignment Facilities costs to be charged to the Transmission Customer under the Tariff will be specified in the Service Agreement prior to initiating service.

13.6 Curtailment of Firm Transmission Service: In the event that a Curtailment on the Transmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system, Curtailments will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, Curtailments will be proportionally allocated among the Transmission Provider's Native Load Customers, Network Customers, and Transmission Customers taking Firm Point-To-Point Transmission Service. All Curtailments will be made on a non-discriminatory basis, however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. When the Transmission Provider determines that an electrical emergency exists on its Transmission System and implements emergency procedures to Curtail Firm Transmission Service, the Transmission Customer shall make the required reductions upon request of the Transmission Provider. However, the Transmission Provider reserves the right to Curtail, in whole or

in part, any Firm Transmission Service provided under the Tariff when, in the Transmission Provider's sole discretion, an emergency or other unforeseen condition impairs or degrades the reliability of its Transmission System. The Transmission Provider will notify all affected Transmission Customers in a timely manner of any scheduled Curtailments.

13.7 Classification of Firm Transmission Service:

(a) The Transmission Customer taking Firm Point-To-Point Transmission Service may (1) change its Receipt and Delivery Points to obtain service on a non-firm basis consistent with the terms of Section 22.1 or (2) request a modification of the Points of Receipt or Delivery on a firm basis pursuant to the terms of Section 22.2.

(b) The Transmission Customer may purchase transmission service to make sales of capacity and energy from multiple generating units that are on the Transmission Provider's Transmission System. For such a purchase of transmission service, the resources will be designated as multiple Points of Receipt, unless the multiple generating units are at the same generating plant in which case the units would be treated as a single Point of Receipt.

(c) The Transmission Provider shall provide firm deliveries of capacity and energy from the Point(s) of Receipt to the Point(s) of Delivery. Each Point of Receipt at which firm transmission capacity is reserved by the Transmission Customer shall be set forth in the Firm Point-To-Point Service Agreement along with a corresponding capacity reservation associated with each Point of Receipt. Each Point of Delivery at which firm transmission capacity is reserved by the Transmission Customer shall be set forth in the Firm Point-To- Point Service Agreement along with a corresponding capacity reservation associated with each Point of Delivery. The greater of either (1) the sum of the capacity reservations at the Point(s) of Receipt, or (2) the sum of the capacity reservations at the Point(s) of Delivery shall be the Transmission Customer's Reserved Capacity. The Transmission Customer will be billed for its

Reserved Capacity under the terms of Schedule 7. The Transmission Customer may not exceed its firm capacity reserved at each Point of Receipt and each Point of Delivery except as otherwise specified in Section 22. The Transmission Provider shall specify the rate treatment and all related terms and conditions applicable in the event that a Transmission Customer (including Third-Party Sales by the Transmission Provider) exceeds its firm reserved capacity at any Point of Receipt or Point of Delivery.

13.8 Scheduling of Firm Point-To-Point Transmission Service: Schedules for the Transmission Customer's Firm Point-To-Point Transmission Service must be submitted to the Transmission Provider no later than 10:00 a.m. [or a reasonable time that is generally accepted in the region and is consistently adhered to by the Transmission Provider] of the day prior to commencement of such service. Schedules submitted after 10:00 a.m. will be accommodated, if practicable. Hour-to-hour schedules of any capacity and energy that is to be delivered must be stated in increments of 1,000 kW per hour (or a reasonable increment that is generally accepted in the region and is consistently adhered to by the Transmission Provider). Transmission Customers within the Transmission Provider's service area with multiple requests for Transmission Service at a Point of Receipt, each of which is under 1,000 kW per hour, may consolidate their service requests at a common point of receipt into units of 1,000 kW per hour for scheduling and billing purposes. Scheduling changes will be permitted up to twenty (20) minutes (or a reasonable time that is generally accepted in the region and is consistently adhered to by the Transmission Provider) before the start of the next clock hour provided that the Delivering Party and Receiving Party also agree to the schedule modification. The Transmission Provider will furnish to the Delivering Party's system operator, hour-to-hour schedules equal to those furnished by the Receiving Party (unless reduced for losses) and shall deliver the capacity and energy provided by such schedules. Should the Transmission Customer, Delivering Party or Receiving Party revise or

terminate any schedule, such party shall immediately notify the Transmission Provider, and the Transmission Provider shall have the right to adjust accordingly the schedule for capacity and energy to be received and to be delivered.

* * *

APPENDIX G

I. Legal Analysis of Commission Jurisdiction Over the Rates, Terms and Conditions of Unbundled Retail Transmission in Interstate Commerce

Based on an analysis of the relevant legislative history and case law under the Federal Power Act (FPA), the Commission concludes that it has exclusive jurisdiction over the rates, terms and conditions of the unbundled transmission in interstate commerce, by a public utility, of electric energy to an end user. This is also known as retail wheeling in interstate commerce.[1]

The Commission's jurisdiction over the rates, terms and conditions of transmission in interstate commerce derives from Congress' power to regulate interstate commerce under the United States Constitution[2] and the FPA. When Congress enacted the FPA, it gave the Commission exclusive jurisdiction over the rates, terms and conditions of transmission in interstate commerce by public utilities. The Supremacy Clause of the Constitution provides that federal laws enacted pursuant to the powers delegated to the federal government by the United States Constitution are the supreme law of the land.[3] Accordingly, to the extent that retail wheeling involves

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[1]Section 212(h) of the FPA provides that no order issued under the FPA shall be conditioned upon or require the transmission of electric energy directly to an ultimate consumer. 16 U.S.C. 824k(h). The Commission's assertion of jurisdiction in this final rule is over the rates, terms and conditions of retail transmission that occurs voluntarily or as a result of a state retail access program.

[2]U.S. Const. art I, Section 8, cl.3.

[3]U.S. Const. art. VI, cl.2.

transmission in interstate commerce by public utilities, the rates, terms and conditions of such service are subject to the exclusive jurisdiction of the Commission, and must be filed with the Commission.[4]

1. Relevant Federal Power Act Provisions

Section 201(b)(1) of the FPA provides:

> The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce * * *. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction * * * over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. 824(b)(1) (emphasis added). Thus, the statute on its face limits Commission jurisdiction over sales of energy to sales at wholesale, but does not limit jurisdiction over transmission to transmission used only for wholesale sales.

Sections 201 (c) and (d) define the meaning of "the transmission of electric energy in interstate commerce" and "sale of electric energy at wholesale in interstate commerce." Section 201(c) provides:

> For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof: but only insofar as such transmission takes place within the United States.

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[4]See Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-52 (1951) (Montana-Dakota).

16 U.S.C. 824(c). Section 201(d) provides:

> The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

16 U.S.C. 824(d).

> Sections 205 and 206 of the FPA give the Commission jurisdiction over the rates, terms and conditions of transmission in interstate commerce, and sales at wholesale in interstate commerce, by public utilities. 16 U.S.C. 824d and 824e.

2. Legislative History and Case Law

Much of the legislative history of the FPA indicates that Congress intended the Commission's jurisdiction to extend only to those matters which the Attleboro decision[5] held to be beyond the reach of the States. For instance, the report accompanying the Senate bill states that subsection (b) "leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State."[6] In other words, states retain authority to regulate rates of electric energy to ultimate consumers. The Senate report also states:

> The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in (Attleboro) to be beyond the reach of the States. Jurisdiction is asserted also over all interstate transmission lines whether or not there is sale of the energy carried by

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[5]Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) (Attleboro). In Attleboro, the Supreme Court held that State regulation of the interstate sale of electricity was barred by the Commerce Clause because such regulation would impose a "direct burden" on interstate commerce.

[6]S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). See also H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

> those lines and over the generating facilities which produce energy[7] for interstate transmission and sale.

S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935) (emphasis added). Thus, federal jurisdiction over transmission lines is not dependent on whether those lines are used to effect a sale, wholesale or otherwise.

The provisions of FPA section 201 reserving certain regulatory authority to the States have been interpreted narrowly.[8] The Supreme Court has stated:

> In section 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy; by its plain terms, section 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise "lawful."[9]

The Court also stated:

> Nothing in the legislative history or language of the statute evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause,' * * *

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[7]The provisions of the Senate bill regarding federal jurisdiction over generating facilities were eliminated from the final version of the bill.

[8]Section 201(a) declares that Federal regulation of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. 824(a). Section 201(b)(1) states that the provisions of Part II of the FPA apply to the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce but, except as specifically provided, "shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U.S.C. 824(b)(1).

[9]New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (NEPCO).

> or to modify the earlier holding of this Court concerning the limits of state authority to restrain interstate trade.[10]

Unlike the narrow interpretations given to the FPA provisions reserving certain regulatory authority to the States,[11] the courts have construed transmission "in interstate commerce" broadly. The term does not turn on whether the contract path for a particular power or transmission sale crosses state lines, but rather follows the physical flow of electricity. Because of the highly integrated nature of the electric system, this results in most transmission of electric energy being "in interstate commerce."

One of the earliest cases construing Commission jurisdiction over transmission was Jersey Central Power & Light Co. v. FPC, 319 U.S. 61 (1943) (Jersey Central). In that case, the Commission asserted jurisdiction over a New Jersey utility by showing that the utility owned transmission facilities that were used to transmit energy in interstate commerce. The Court found that the Commission had demonstrated that the utility owned transmission facilities that were indirectly interconnected, through a second New Jersey utility, to facilities owned by a New York utility and that the facilities were used to transmit electric energy in interstate commerce.

The Court noted that section 201(c) of the FPA defines electric energy transmitted in interstate commerce to be energy "transmitted from a State and consumed at any point outside thereof." The Court stated:

> It is impossible for us to conclude that this definition [of transmission in interstate commerce] means less than it

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[10]Id. (citation omitted).

[11]While Congress may exercise its Commerce Clause authority to grant the States that "ability to restrict the flow of interstate commerce that they would not otherwise enjoy", Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980), States may not exercise such regulatory powers unless Congress has expressly stated its intention to make such an affirmative grant of power. NEPCO, 455 U.S. at 343.

> says and applies only to the energy at the instant it crosses the state line and so only to the facilities which cross the line and only to the company which owns the facilities that cross the line.

319 U.S. at 71. Thus, a critical question regarding the jurisdictional status of a wheeling transaction is whether the facilities used to provide the service transmit electric energy in interstate commerce.

In Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945) (CL&P), the Court reviewed the Commission's finding that a Connecticut utility was jurisdictional because it owned transmission facilities that were used in interstate commerce. The Court generally embraced the Jersey Central standard for determining whether facilities are used to transmit electric energy in interstate commerce. The Court emphasized that whether certain facilities transmit electric energy in interstate commerce is more a technical than a legal question. The Court stated:

> Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.

324 U.S. at 529. Thus, the Court adopted the Jersey Central test providing that the Commission's jurisdiction generally extends to transmission facilities that transmit electric energy in interstate commerce.

The Court also applied the Jersey Central test in FPC v. Florida Power & Light Co., 404 U.S. 453 (1972), affirming the Commission's finding of jurisdiction over a Florida utility. The Commission demonstrated that the utility transmitted power to another Florida utility's "bus"[12] and that power was

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[12]A bus is an electrical conductor which serves as a common connection for two or more electrical circuits. Electric Utility Rate Design Study, Glossary: Electric Utility and Ratemaking Load & Management Terms, Edison Electric Institute (Sept. 11, 1978).

simultaneously transferred from the "bus" to a Georgia utility. The Court upheld the Commission's finding that electric energy from the two Florida utilities was commingled and was therefore transmitted in interstate commerce. 404 U.S. at 463.

In all of the above cases, the Court's decisions turned on whether energy being transmitted flowed in interstate commerce as a technical matter. The decisions did not turn on whether the transmission of energy flowing in interstate commerce involved energy that was being sold for resale or was being sold to an end user. Thus, there is nothing in the statute, its legislative history, or the case law to indicate that the Commission's jurisdiction over rates, terms and conditions of transmission in interstate commerce extends only to wholesale transmission and not retail transmission. Indeed, the statute on its face gives the Commission jurisdiction over transmission in interstate commerce and makes no distinction between wholesale transmission and retail transmission.

However, there are two important limitations on Commission authority. First, as discussed above, the FPA does not give the Commission jurisdiction over sales of electric energy at retail. Such sales historically have been bundled sales (i.e., generation and transmission), and courts and the Commission have recognized State jurisdiction over bundled sales of energy. Second, under section 201(b)(1) of the FPA, the Commission does not have jurisdiction over facilities used in local distribution. In CL&P, the Court stated that local distribution facilities are exempt from Commission jurisdiction even if those facilities "carry no energy except extra-state energy." 324 U.S. at 531.

In the next section the Commission further discusses the statutory provisions and case law that shed light on the demarcation between transmission and local distribution, and thus on the jurisdictional line between federal and State authority.

II. Legal Analysis of Commission Jurisdictional Transmission Facilities and State Jurisdictional Local Distribution Facilities

Two specific circumstances are addressed:

First, what facilities are jurisdictional to the Commission in a situation involving the unbundled delivery in interstate commerce by a public utility of electric energy from a third-party supplier to a purchaser who will then re- sell the energy to an end user?

Second, what facilities are jurisdictional to the Commission in a situation involving the unbundled delivery in interstate commerce by a public utility of electric energy from a third-party supplier to an end user?

Based on an analysis of the relevant legislative history and case law under the FPA, the Commission reaches the following conclusions. With respect to the first circumstance, the Commission concludes that a public utility's facilities used to deliver electric energy to a wholesale purchaser, whether labeled "transmission," "distribution," or "local distribution" are subject to the Commission's exclusive jurisdiction under sections 205 and 206 of the FPA, and that a public utility's facilities used to deliver electric energy from the wholesale purchaser to the ultimate consumer are "local distribution" facilities subject to the rate jurisdiction of the state.[13]

With respect to the second circumstance, the Commission believes that, based on the particular facts of the case, some of the public utility's facilities used to deliver electric energy to an end-user may be FERC- jurisdictional transmission facilities,

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[13]There are, of course, facilities that are used to provide delivery to both wholesale purchasers and end users. In those situations, we believe that the Commission and the States have jurisdiction to set rates for the services that are within their respective jurisdictions. That facilities are used to serve resale and retail customers does not, however, necessarily mean that the facilities are local distribution facilities.

while some of the facilities used may be state-jurisdictional local distribution facilities.

We set forth below the relevant legislative history and case law, our legal conclusions, and the factors which we believe are indicative of whether facilities are used in "local distribution" or "transmission in interstate commerce," as those terms are used in the FPA.

1. Relevant Federal Power Act Provisions

The Commission's jurisdiction is set forth in section 201 of the FPA.[14] Section 201(b)(1) provides in pertinent part:

> The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce * * *. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction * * * over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.[15]

Some of the court decisions that construe jurisdictional facilities under section 201 also construe the Commission's jurisdiction under section 203. Section 203(a) provides, in relevant part:

> No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, * * * or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person * * * without first having secured an order of the Commission to do so.[16]

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[14] 16 U.S.C. 824.

[15] 16 U.S.C. 824(b) (emphasis added).

[16] 16 U.S.C. 824b (emphasis added).

In addition, section 206(d) concerns facilities "under the jurisdiction of the Commission":

> The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.[17]

2. Legislative History of the FPA

The relevant legislative history of the general purposes of Title II of the FPA, and of section 201 in particular, focuses primarily on bundled sales of electric energy and does not directly address the issue of what constitutes local distribution as opposed to transmission in interstate commerce.

In discussing the general purposes of Title II of the House bill, the House Report states:

> Title II * * * establishes for the first time regulation of electric utility companies transmitting energy in interstate commerce.
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> * * * * *
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> * * * Under the decision of the Supreme Court of the United States in (Attleboro), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A "wholesale" transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.[18]

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[17] 16 U.S.C. 824e(d) (emphasis added).

[18] H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935).

In its analysis of section 201, the House Report states:

> As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State.[19]

The Senate Report's discussion of the general purposes of the FPA states:

> The decision of the Supreme Court in (Attleboro) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from State control either legally or practically.[20]

In discussing material differences between the final version of the Senate bill and the original version, the Senate Report states:

> Subsection (b), formerly (a), which states the subject matter to which the part relates, has been clarified to make plain that it includes interstate transmission where there is no sale and excludes all facilities used only for production of transmission in intrastate commerce or in local distribution.[21]

In discussing section 201 of the Senate bill, the Senate Report further states:

> The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in (Attleboro) to be beyond the reach of the States.

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[19]Id. at 27.

[20]S. Rep. No. 621, 74th Cong., 1st Sess. at 17 (1935). See id. at 18 ("The revision [between the original and final versions of the Senate bill] has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States.")

[21]Id. at 19.

> Jurisdiction is asserted also over all interstate transmission lines whether or not there is sale of the energy carried by those lines and over the generating facilities which produce energy for interstate transmission and sale. It is obvious that no steps can be taken to secure the planned coordination of this industry on a regional scale unless all of the facilities, other than those used solely for retail distribution, are made subject to the jurisdiction of the Commission. Facilities used only for intrastate commerce or local distribution are expressly excluded from the operation of the act.[22]

The Conference Report adds little description regarding jurisdictional facilities. In reference to section 201(b) it states that:

> [T]he language of the House amendment has been followed with a clarifying phrase added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation and local distribution of electric energy to the extent provided in other sections of this part and the part next following.[23]

In addition to the above statements pertaining to section 201 of the FPA, Congress referenced distribution of energy in the legislative history of section 206(d). Section 206(d) was originally enacted as section 206(b) of the FPA. Under the Regulatory Fairness Act of 1988,[24] section 206(b) was redesignated as section 206(d).

The Conference Report on the original FPA does not address section 206(b). The Senate Report on the FPA bill states in pertinent part:

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[22]Id. at 48. The provisions of the Senate bill regarding federal jurisdiction over generating facilities were eliminated from the final version of the bill.

[23]H.R. Conf. Rep. No. 1903, 74th Cong., 1st Sess. 74 (1935).

[24]Pub. L. No. 100-473, 102 Stat. 2299 (1988).

> Subsection (b) authorizes the Commission to investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. * * * Since the rate-making powers granted to the Commission apply only to the wholesale rates of energy sold in interstate commerce, this last subsection should be of great benefit in removing the practical difficulty which the States may encounter in regulating the interstate distribution rates which are left under their control. Such rate regulation involves the examination and valuation of property outside the State. The task is one requiring an agency with a jurisdiction broader than that of a single State. The authority of the Federal Commission is to render assistance to the State commissions in a way which would preserve and make more effective the jurisdiction which is thus left to the States.[25]

The House Report discusses section 206(b) as follows:

> This subsection reaches those situations where electric energy is transmitted in interstate commerce by the same company which distributes it locally, and will greatly aid State commissions in fixing reasonable rates in such cases.[26]

Thus, the discussions in the two reports do not appear to contemplate a situation in which the transmitter and seller of electric energy are different, and neither is a "local" distributor. The House Report expressly refers to the same company being the transmitter and seller of electric energy. The Senate Report by its terms addresses the regulation of interstate distribution rates.[27]

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[25]S. Rep. No. 621, 74th Cong., 1st Sess. 51 (1935) (emphasis added).

[26]H.R. Rep. No. 1318, 74th Cong., 1st Sess. 29 (1935) (emphasis added).

[27]The Senate Report states that interstate distribution rates are left in the

The above legislative history on sections 201 and 206(b) does not provide any definitive answers to the questions raised. We therefore turn to the case law under the FPA.

3. Case Law Under the FPA

Jersey Central was the first of the major FPC jurisdictional cases considered by the Supreme Court. The case involved the acquisition by New Jersey Power and Light Company (New Jersey Power) of certain securities of Jersey Central Power & Light Company (Jersey Central) without the Commission's prior approval. The question before the Court was whether Jersey Central was a "public utility" under section 201(e)[28] of the FPA so that the Commission's prior approval of the stock acquisition was necessary under section 203 of the FPA.

Jersey Central owned transmission facilities that connected to facilities that Public Service Electric & Gas Company (Public Service) owned. The interconnection of these transmission facilities was in New Jersey. Public Service's facilities in turn connected to the facilities of the Staten Island Edison Corporation (Staten Island Edison), a New York utility, at the mid- channel of Kill van Kull, a body of water separating New Jersey and New York. Jersey Central delivered energy to and received energy from Public Service under contract, and Public Service delivered energy to and received energy from Staten Island Edison under contract.[29]

States control. Obviously, the Senate drew a distinction between interstate distribution (left in the States control) and interstate transmission (given to the FPC). Compare S. Rep. No. 621 at 49 with H.R. Rep. No. 1318 at 51.

[28]Section 201(e) defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction under this Part (other than facilities subject to such jurisdiction solely by reason of section 210, 211, or 212)". 16 U.S.C. 824(e). The section as adopted in 1935 did not contain the parenthetical, which was adopted in 1978 as part of the Public Utility Regulatory Policies Act.

[29]Jersey Central, 319 U.S. at 63-65.

The Court found that, although Jersey Central generated and received electricity only in New Jersey, some of the electric energy that it dispatched to Public Service "was instantaneously transmitted to New York."[30] The Court held that "[t]his evidence * * * furnishes substantial basis for the conclusion of the Commission that facilities of Jersey Central are utilized for the transmission of electric energy across state lines."[31] Therefore, the Court found that Jersey Central was a public utility within the meaning of section 201(e).[32]

The Court cited Attleboro, in which the Court found that the sale of locally produced electric energy for use in another state resulted in the transmission of electric energy in interstate commerce, even though title passed at the state line.[33] In Jersey Central, the Court explained the rationale for federal jurisdiction as follows:

> (Section 201(c) of the FPA) defines the electric energy in commerce as that "transmitted from a State and consumed at any point outside thereof." There was no change in this definition in the various drafts of the bill. The definition was used to "lend precision to the scope of the bill." It is impossible for us to conclude that this definition means less than it says * * *. The purpose of this act was primarily to regulate the rates and charges of the interstate energy.[34]

The Court in Jersey Central thus interpreted the FPA as placing within the federal province regulation of wholesale sales of electric energy that, in any manner, flows in interstate commerce. The language quoted above and the citation to section 201(c) of the FPA, to be relied upon in subsequent

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[30]Id. at 66.

[31]Id. at 67 (citation omitted).

[32]Id. at 73.

[33]273 U.S. at 86, 89-90.

[34]319 U.S. at 71 (footnote omitted).

Supreme Court cases, strongly suggested that the Commission's jurisdiction was not based on whether there was a sale by the utility, but rather on the flow of electric energy either into or out of a state, so long as the energy crosses state lines.

CL&P, which was decided two years after Jersey Central, is the leading case interpreting the section 201(b) local distribution proviso. In CL&P, the Commission sought to regulate the accounting practices of Connecticut Light & Power Company (CL&P).[35] At issue was whether CL&P was a "public utility" under the FPA. The utility's system encompassed an area solely within a single state (Connecticut)[36] and did not interconnect with any other company that operated out of state.[37] "Its purchases and sales, its receipts and deliveries of power, (were) all within the state."[38] However, CL&P did purchase energy from companies that had, in turn, purchased energy from Massachusetts. The company also sold energy to a municipality that exported a portion of that energy to Fishers Island, located off the coast of Connecticut but "territory of New York."[39] The Commission based its jurisdiction on these few transactions.[40]

The Court of Appeals affirmed the Commission, holding that the Commission's jurisdiction extended to "electric distribution systems which normally would operate as interstate businesses." The Court of Appeals found that:

> Whether or not the facilities by which petitioner distributes energy from Massachusetts should be classified as 'local' is not relevant to this case. The sole test of jurisdiction of

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[35]CL&P, 324 U.S. at 517.

[36]Id. at 518.

[37]Id. at 521.

[38]Id. at 522.

[39]Id. at 519-21.

[40]Id.

> the Commission over accounts is whether these facilities, 'local' or otherwise, are used for the transmission of electric energy from a point in one state to a point in another.[41]

The Supreme Court reversed. It held that the statutory language in section 201(b) of the FPA providing that the Commission "shall not have jurisdiction * * * over facilities used in local distribution" is a limitation upon Commission jurisdiction that "the Commission must observe and the courts must enforce."[42] In analyzing the statute, the Court stated:

> It has never been questioned that technologically generation, transmission, distribution and consumption are so fused and interdependent that the whole enterprise is within the reach of the commerce power of Congress, either on the basis that it is, or that it affects, interstate commerce, if at any point it crosses a state line.
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> * * * * *
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> But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what it said by the words "but shall not have jurisdiction * * * over facilities used in local distribution." Congress by these terms plainly was trying to reconcile the claims of federal and local authorities and to apportion federal and state jurisdiction over the industry.[43]

The Court decided that this limitation on jurisdiction was "a legal standard that must be given effect in this case in addition to the technological transmission test."[44] The Court stated that whether or not local distribution facilities carried out-of-state electric energy was irrelevant. Whatever the origin of the

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[41]Id. at 522, quoting Connecticut Light & Power Co. v. FPC, 141 F.2d 14, 18 (D.C. Cir. 1944).

[42]324 U.S. at 529.

[43]Id. at 529-31.

[44] Id. at 531.

electric energy they carried, so long as the utility used the lines for local distribution,[45] they were exempt from federal jurisdiction.[46] In fact, the Court stated that local distribution facilities "may carry no energy except extra-state energy and still be exempt under the Act." Id. at 531. The Court concluded that the Commission's order:

> Must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution.[47]

Upon reversing the Court of Appeals, the Court commented, in dictum, on the evidence the Commission had relied upon in finding that the facilities in question were used for transmission. It noted that the Commission had relied upon certain gas transportation cases in concluding that transmission extends from the generator to the point where the function of conveyance in bulk over distance is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of "local distribution," is begun. The Court cautioned:

> But a holding that distributing gas at low pressure to consumers is a local business is not a holding that the process of reducing it from high to low pressure is not also part of such local business. In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down.[48]

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[45]It appears that while the Company received power (at one location) at 66 kV, it primarily owned facilities at 13.8 kV and below.

[46]324 U.S. at 531.

[47]Id. at 531 (emphasis added).

[48]Id. at 534.

The Court also noted in its dictum, however, that once a company is properly found to be a "public utility" under the Act, the fact that a local commission may also have jurisdiction does not preclude exercise of the Commission's functions. Id. at 533.[49] The Court instructed the lower court to remand the case to the Commission for a finding regarding whether the facilities in question were used in local distribution.[50]

The CL&P case was ultimately disposed of without the Commission having made a finding that the facilities were used in local distribution. While the Commission found that it was "extremely doubtful" that it could find that the facilities in question were not local distribution facilities, 6 FPC 104, 106 (1947), the Commission did not articulate a definition of local distribution facilities.

In Wisconsin-Michigan Power Co. v. Federal Power Commission,[51] the Seventh Circuit held that a utility was a jurisdictional public utility where it operated two divisions in Wisconsin and Michigan in a coordinated manner such that

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[49]See United States v. Public Utilities Commission of California, 345 U.S. 295, 316 (1953) (Public Utilities Commission): Certainly the concrete fact of resale of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route "commingled" with other power sold by the same seller and eventually directly consumed by the same purchaser-distributor.

See also Arkansas Power & Light Co. v. FPC, 368 F.2d 376, 383 (8th Cir. 1966) ("Where a company is in fact a public utility, all wholesale sales for resale in interstate commerce are subject to the provisions of sections 205 and 206 of the (FPA), regardless of the facilities used."). The Eighth Circuit further noted that the section 201(b) exemption applies to a company's status as a public utility and not to the Commission's jurisdiction over sales in interstate commerce for resale. Id., citing Public Utilities Commission, Colton, infra, and Wisconsin-Michigan, infra.

[50]Id. at 536.

[51]197 F.2d 472 (7th Cir. 1952), cert. denied, 345 U.S. 934 (1953) (Wisconsin-Michigan).

electric energy from one state was transmitted to the other, and vice versa, "in appreciable amounts by the power company and by it commingled with energy generated in the two respective districts and then delivered to the [wholesale] customers * * *."[52] The court also rejected the notion that the energy changed its form or character when it was stepped down in voltage before it reached the wholesale purchasers.[53]

The court in Wisconsin-Michigan distinguished between transmission and local distribution by focusing on wholesale sales of electric energy versus retail sales ("local rates") of electric energy. It cited the House Report on the FPA, and characterized the legislative history as follows:

> The legislative history, (H.R. Rep. No. 1318), 74th Cong., 1st Sess. pages 7, 8 and 27 (1935), discloses that the Congressional Committee intended that the provisions of the (FPA) should apply to the transmission of electric energy in interstate commerce, i.e., the sale of energy at wholesale in interstate commerce, but not to the retail sale of any such energy in local distribution; that the (FPA) left to the state the authority to fix local rates where the energy is brought in from other states, and that the rate making power of the (FPC) was to be confined to those wholesale transmissions which the Supreme Court had held in (Attleboro) to be beyond the reach of the state. Under that decision, said the committee, the rates charged in interstate wholesale transactions could not be regulated by the states. It defined a wholesale transaction as the sale of electric energy for resale.[54]

The Seventh Circuit's characterization of the House Report seems to equate transmission of electric energy in interstate

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[52]Id. at 474.

[53]Id. ("Obviously the energy thus transmitted in interstate commerce is not changed in form or in character except that the voltage is reduced to an extent consistent with efficient economic management and operation.")

[54]197 F.2d at 476 (emphasis added).

commerce with the sale of energy at wholesale in interstate commerce. However, this interpretation is at odds with both the plain words of the statute as well as the language of the House Report, both of which refer to transmission in interstate commerce separately from sales for resale in interstate commerce.[55] In addition, the Senate Report, which the Seventh Circuit did not mention, clearly recognized jurisdiction over all interstate transmission lines, whether or not a sale of energy is carried by those lines.[56]

The Wisconsin-Michigan court also cited analogous natural gas cases, stating that "[t]he question is essentially, when does interstate commerce transportation end and where do the local distribution facilities first become operative."[57] The court further stated that:

(U)pon delivery to (the wholesaler) local distribution begins when he resells. His sales and distribution at retail are clearly local in character, and constitute only local distribution; but at no point before delivery to him has been completed, has interstate transmission terminated. In other words, "facilities used in local distribution" means facilities used for making resale and distribution to consumers, jurisdiction over which is left to the states. It was only because of this conclusion that the Supreme Court said, (citation omitted), the Act "cut(s) sharply and cleanly between sales for resale and direct sales for consumptive uses." We think there is no ground for the position

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[55]See H.R. Rep. No. 1318 at 27. ("Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy in wholesale in interstate commerce * * *," emphasis added).

[56]See S. Rep. No. 621 at 48 ("Jurisdiction is asserted over all interstate transmission lines whether or not there is a sale of the energy carried by those lines * * *.").

[57]197 F.2d at 477.

that local distribution includes any transmission occurring before the wholesaler who resells at retail is reached.[58]

The Seventh Circuit concluded that the sales for resale were made in interstate commerce; that local distribution had not begun; that the interstate character of the transmission persisted until delivery to the wholesaler; that, up to that point, no local distribution facilities were in operation and that, therefore, the sales were subject to Commission regulation.

In Federal Power Commission v. Southern California Edison Company (the Colton case),[59] the Supreme Court held that the FPA provides a clear line of demarcation between jurisdictional transactions and non-jurisdictional transactions. However, this case, too, involved bundled sales of electric energy. In the facts of the case, Southern California Edison Company (Edison) admitted that it was a public utility by virtue of owning two interstate transmission lines.[60] At issue was whether its sales of electric energy to the City of Colton, California, for resale to Colton's retail customers, were jurisdictional. Included in the electric energy that Edison sold to Colton was out-of-state electric energy from Hoover Dam.[61] The Commission ruled that the sale to Colton was a sale of electric energy at wholesale in interstate commerce subject to regulation under the FPA.[62] In upholding the Commission, the Court held that Edison's

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[58]Id., citing FPC v. East Ohio Gas Co., 338 U.S. 464 (1950) (East Ohio).

[59]376 U.S. 205 (1964) (Colton).

[60]The Supreme Court noted that Edison's status as a public utility did not decide the question of whether the FPC could assert jurisdiction over the rates for the Edison-Colton sale. Id. at 208 n.3.

[61]Id. at 208, 209 & n.5.

[62]Id. at 208. See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 380 (1983) ("(Colton) held, among other things, that * * * a California utility that received some of its power from out-of-state was subject to federal and not state regulation in its sales of electricity to a California municipality that resold the bulk of the power to others.").

importation of out-of-state electricity for resale to Colton sufficed to confer federal jurisdiction.

The Court, citing an earlier Supreme Court case,[63] characterized Congressional intent in the FPA:

> (W)hat Congress did was to adopt the test developed in the Attleboro line which denied state power to regulate a sale "at wholesale to local distributing companies" and allowed state regulation of a sale at "local retail rates to ultimate consumers."[64]

The Court rejected the argument that FPC jurisdiction was confined to those interstate wholesale sales constitutionally beyond the power of state regulation by force of the Commerce Clause, and was to be determined on a case-by-case analysis of the impact of state regulation upon the national interest. The Court stated that in the FPA:

> (C)ongress meant to draw a bright-line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extend[ed] it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.[65]

The Court held that "(t)here is no such exception covering the Edison-Colton sale."[66]

Parties in the Colton case had raised the question of whether jurisdiction over the Colton sale was prevented by the "local distribution" proviso of section 201(b). The Court stated that whether facilities are local distribution facilities is a matter for

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[63]Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 504 (1942).

[64]376 U.S. at 214.

[65]Id. at 215-216.

[66]Id. at 216 (footnote omitted).

the Commission to decide in the first instance. Citing CL&P, supra, it stated:

> Whether facilities are used in local distribution--although a limitation on FPC jurisdiction and a legal standard that must be given effect in addition to the technological transmission test * * *--involves a question of fact to be decided by the FPC as an original matter.[67]

The Court cited evidentiary support and the Commission's expertise in such matters in upholding the Commission's determination that certain facilities owned by Edison were used exclusively to effect the wholesale sale to Colton and not for local distribution. Such facilities included 12 kV lines that served an industrial customer, several lighted highway signs, a residence and a railroad section house before they reached the transformers in the Colton substation. The FPC had held that those uses prior to the lines reaching the Colton substation did not transform the lines into local distribution facilities.[68]

In Duke Power Company v. Federal Power Commission (Duke),[69] the D.C. Circuit held that a public utility's acquisition of facilities used solely in local distribution, and which would continue to be used for local distribution, was beyond the Commission's jurisdiction under section 203. The case involved Duke Power Company's (Duke's) proposed acquisition of facilities owned by Clemson University (Clemson), which were used to distribute electricity off- campus to customers (primarily university personnel) in two South Carolina counties. Clemson purchased the power at wholesale from Duke. No one appeared to contest the conclusion that the 7 miles of distribution line and 418 service connections owned by Clemson were "local distribution" facilities.[70] Rather, the case

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[67]Id. at 210 n.6 (citation omitted).

[68]Id. at 210 n.6.

[69]401 F.2d 930 (D.C. Cir. 1968) (Duke).

[70]Duke delivered power to Clemson at a distribution voltage of 4,160 volts. The step-down transformers by which the voltage was reduced, and

turned on interpreting section 203 and whether it was intended to affect only acquisitions of jurisdictional facilities, or also to affect acquisitions of non-jurisdictional facilities. In interpreting section 203, however, the D.C. Circuit extensively analyzed and discussed the fundamental jurisdictional lines that Congress drew in section 201.

Citing to the CL&P case, the court in Duke stated:

> The Act, as we have seen, effectuated federal control over the transmission and the sale at wholesale of electric energy in interstate commerce, and established the Commission's regulatory power over public utilities engaging in either of these pursuits.[71]

However, quoting CL&P, the court further stated:

> The expression "facilities used in local distribution" is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.[72]

The court further rejected the Commission's concept that, in order to determine whether jurisdiction over any particular acquisition existed, the impact of local supervision be measured on a case-by-case basis. Quoting from Colton, the court stated:

> [T]his "flexible approach"--involving as it does the consideration, inter alia, of "the effect of the regulation upon the national interest in the commerce"--has been flatly rejected as a technique for resolving jurisdictional conflicts between the Commission and state bodies. * * *

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the substations at which the delivery was effected, were owned by Duke. 401 F.2d at 931, n.8.

[71]401 F.2d at 938-39 (emphasis added, footnotes omitted).

[72]Id. (footnote omitted).

> We think that like the line "(i)t cut sharply and cleanly between sales for resale and direct sales for consumptive uses" to facilitate jurisdictional determinations in rate regulation, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis," in distributing regulatory power over the acquisition of facilities.[73]

The court rejected the Commission's argument that jurisdiction over the merger or consolidation of jurisdictional facilities with those of any other "person" under section 203 gave the Commission jurisdiction over Duke's acquisition. The court stated that the FPA reflects a policy "that matters largely of a local nature, even though interstate in character, should be handled locally and should receive the consideration of local [officials] familiar with the local conditions in the communities involved."'[74]

Federal Power Commission v. Florida Power & Light Company[75] is the last major court case to address the Commission's transmission jurisdiction. In this case, the Commission sought to impose its accounting rules upon Florida Power & Light Company (Florida Power & Light). The company's system lay solely within the borders of Florida and did not directly connect with any out-of-state utility.[76] The Commission held that Florida Power & Light did own facilities that transmitted electric energy in interstate commerce, but the Court of Appeals for the Fifth Circuit ruled that the Commission did not have substantial evidence to support its finding.

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[73]Id. at 949 (footnotes omitted).

[74]Id. at 936 (quoting from Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 393 (1935) (testimony of then-FPC Commissioner Seavey)).

[75]404 U.S. 453, reh'g denied, 405 U.S. 948 (1972) (Florida Power & Light).

[76]404 U.S. at 456.

The Supreme Court reversed. The Supreme Court noted that Florida Power & Light was a member of the Florida Power Pool along with Florida Power Corporation (Florida Power Corp.).[77] In turn, Florida Power Corp. connected with Georgia Power Company (Georgia Power) at a "bus"[78] south of the Georgia-Florida border.[79] Florida Power Corp. regularly exchanged power with Georgia Power.[80] In many instances, Florida Power Corp. transferred power to Florida Power & Light instantly after receiving power from Georgia Power, and transferred power to Georgia Power immediately after receiving power from Florida Power & Light.[81] The Supreme Court found that power commingled in the bus moved across state lines, and concluded that Florida Power & Light engaged in transmission in interstate commerce. The Court held that, to establish jurisdiction, the Commission need only show that "some (Florida Power & Light) power goes out of State."[82] The Court further explained that "(i)f any (Florida Power & Light) power has reached Georgia, or (if Florida Power & Light) makes use of any Georgia power * * * FPC jurisdiction will attach * * *."[83]

There is also a line of cases that address, among other things, what constitutes a Commission jurisdictional "sale of electric energy at wholesale"[84] under section 201 of the FPA.[85] These

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[77]Id. at 456.

[78]A "bus" is a connector or group of connectors that serves as a common connection for two or more circuits.

[79]404 U.S. at 457.

[80]Id.

[81]FN81 Id. at 457 & n.8.

[82]Id. at 461. (emphasis omitted).

[83]Id. at 461 n.10. (emphasis added).

[84]See Section 201(d), 16 U.S.C. 824(d) (1988).

[85]Public Utilities Commission, supra note 345; City of Oakland, California v. FERC, 754 F.2d 1378 (9th Cir. 1985) (Oakland). See also Alexander v. FERC, 609 F.2d 543 (D.C. Cir. 1979) (Alexander).

cases all concerned bundled sales. While the issues posed above involve unbundled wheeling, the "resale" cases are helpful to the extent they suggest that local distribution takes place only after power is subdivided. See, e.g., 345 U.S. at 316 ("the facilities supplied 'local distribution' only after the current was subdivided for individual consumers.").

4. Natural Gas Act

The Natural Gas Act (NGA) was adopted in 1938. Like the FPA, the NGA contains language limiting the Commission's jurisdiction in situations involving local distribution.[86]

Section 1(b) of the NGA provides:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural.[87]

There is similarity in many respects between the House and Senate Reports on the FPA and the NGA with respect to the jurisdiction given the Commission. For example, all four reports mention Attleboro as placing interstate wholesale transactions beyond the reach of the States. As indicated in the House Report on the NGA, the States could "regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation." (See H.R. Rep. No. 709, 75th Cong., 1st Sess. 1).

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[86]Courts often rely on cases construing the NGA when interpreting the FPA, and vice versa. E.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981).

[87]15 U.S.C. 717(b) (emphasis added).

However, the House and Senate Reports on the NGA contain identical language not found in the reports on the FPA:

> In view of the importance of section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> But shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character. (Emphasis added).[88]

As a result of this language it can be argued that Congress considered distribution (and local distribution) only in the context of bundled retail sales of natural gas. In fact, it appears

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[88]H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 3 (1937).

that all of the court cases affirming the states' right to regulate local distribution of gas have involved bundled retail sales. See Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951) (Panhandle). There the Court, in affirming the State of Michigan's right to regulate an interstate pipeline's proposed bundled retail sales of gas to industrial consumers, noted that the pipeline company proposed to lay pipeline in "the streets and alleys of Detroit" and ignored the local distribution company's request for additional gas to meet the increased needs of the industrial consumers. Id. at 333. While the Court based its holding on a state's authority to regulate direct (retail) sales to an end-user, rather than on the basis of the section 1(b) local distribution provision, it also found that the proposed sales were "primarily of local interest" and "emphasized the need for local regulation." Id. Two years before Panhandle, the Supreme Court issued its decision in FPC v. East Ohio Gas Co., 338 U.S. 465 (1949) (East Ohio). East Ohio Gas Company owned and operated a natural gas business wholly within the State of Ohio. The company sold gas only to Ohio customers but most of the gas was transported to Ohio from other states by interstate pipelines. These interstate pipelines connected inside Ohio with East Ohio's large high pressure lines. The gas then was transported over 100 miles through East Ohio's system to its local distribution system. East Ohio argued that it was exempt from Commission jurisdiction because all of its facilities were local distribution.

The Court disagreed, finding the Commission's jurisdiction extends over the transportation of gas in interstate commerce through high- pressure transmission lines and that distribution did not begin until the point where pressure is reduced and gas enters local mains. The Court stated that: "[w]hat Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among customers within a particular local community, not the high-pressure pipelines transporting the gas to the local mains."[89]

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[89] 338 U.S. at 469-70.

The Commission relied in part on East Ohio's high pressure/low pressure distinction in a recent NGA section 7 certificate case which authorized construction of facilities to bypass the local distribution company.[20] On appeal, the California Commission argued that under section 1(b) it should at least have "jurisdiction over the 'taps, meters and other tie-in facilities' that link the pipeline to end users."[21] The court disagreed:

> While as a matter of ordinary English 'local distribution' might be understood to encompass any delivery to an end user, that is hardly the only or even more plausible reading. Distribution conjures up receiving a large quantity of some good and parcelling it out among many takers.[22]

After reviewing the report language discussed above, the court also stated:

> Insofar as congressional committees spoke to the matter * * * they appear to have viewed distribution as confined to its parcelling out function and (probably) even more narrowly, to parcelling out accompanied by retail sales.[23]

In Cascade Natural Gas Corporation v. FERC, et al. (Cascade), the court affirmed the Commission's authorizing an interstate pipeline under section 7 of the NGA "to construct a tap and meter facility that would allow it to deliver natural gas directly to two industrial consumers * * *."[24] To reach the interstate pipeline, the industrials constructed a nine-mile

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[20]See Mojave Pipeline Company, 35 FERC 61,199 (1986), reh'g denied, 41 FERC 61,040 (1987), reh'g denied, 42 FERC 61,351 (1988); see also Mojave Pipeline Company, 66 FERC 61,194 (1994), reh'g pending.

[21]See Public Utilities Commission of the State of California v. FERC, et al., 900 F.2d 269, 273 (D.C. Cir. 1990) (footnote omitted) (WyCal).

[22]Id. at 276.

[23]Id. (emphasis in original).

[24]955 F.2d 1412, 1414 (10th Cir. 1992).

pipeline. Together, the facilities bypassed the local distribution company.[95]

The court rejected arguments that section 1(b) deprived the Commission of jurisdiction holding that:

> "Local distribution," as Congress viewed the term, involves two components: the retail sale of natural gas and its local delivery, normally through a network of branch lines designed to supply local consumers.[96]

5. Analysis

a. What facilities are jurisdictional to the Commission in a situation involving the unbundled delivery in interstate commerce by a public utility of electric energy from a third-party supplier to a purchaser who will then re-sell the energy to an end user?

The case law supports the conclusion that any facilities of a public utility used to deliver electric energy in interstate commerce to a wholesale purchaser, whether such facilities are labeled "transmission," "distribution" or "local distribution," are subject to the Commission's jurisdiction under sections 205 and 206.

This conclusion is supported by Public Utilities Commission, supra, in which the Supreme Court, in the section of its opinion addressing the section 201(b) local distribution provision, held that local distribution facilities began "only after the current was subdivided for individual consumers."[97] Wisconsin-Michigan, supra, in which the Seventh Circuit held

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[95]Unlike the situation in WyCal where the pipeline made direct sales to end users, in Cascade the pipeline transported gas purchased from third parties. See Northwest Pipeline Corporation, 51 FERC 61,289 at 61,909 (1990).

[96]Cascade, 955 F.2d at 1421.

[97]345 U.S. at 316 (footnote omitted).

that there is no local distribution until the wholesaler who re-sells at retail is reached, is to like effect.

This conclusion, which results in a "functional" line being drawn to determine Commission jurisdiction, is not only consistent with the case law under section 201, but is also consistent with our interpretation of the line drawn under newly amended FPA sections 211 and 212. As long as electric energy is being sold to a legitimate wholesale purchaser, we believe the Commission has jurisdiction under sections 201, 205, and 206 of the FPA over the public utility's facilities used to deliver electric energy to that purchaser.

b. What facilities are jurisdictional to the Commission in a situation involving the unbundled delivery in interstate commerce by a public utility of electric energy from a third-party supplier directly to an end user?

In analyzing jurisdiction over unbundled retail wheeling, we believe it is important to distinguish between unbundled wheeling provided by the public utility who previously provided bundled retail service to the end user, and unbundled wheeling provided by other public utilities to the end user. For example, a former bundled retail customer may need unbundled wheeling services from its previous public utility generation supplier, as well as unbundled wheeling from one or more intervening public utilities, in order to reach a distant generation supplier. In this scenario, the Commission believes it would have jurisdiction over all of the facilities used for the unbundled wheeling provided by the intervening public utilities.[98] The more difficult issue is whether some portion of the facilities used to transmit energy from the transmitting utility in closest proximity to the end user (the former supplier of the bundled product) is local distribution facilities. We believe that in most,

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[98]The Commission would not have jurisdiction over the rates for the sale of generation by the distant supplier because the transaction would be a retail sale of electric energy.

if not all circumstances, some portion will be local distribution facilities.

The case law is replete with statements that the local distribution provision of section 201 must be given effect. However, the Supreme Court in both CL&P and Colton, supra, has stated that whether facilities are used in local distribution is a question of fact to be decided by the Commission as an original matter. Thus, there is no clear case law on a "bright line" between transmission and local distribution. In addition, regardless of the details of the chain of delivery services necessary to move electric energy from the generator to the end user, in most cases the last public utility in the chain will use facilities that historically were considered local distribution facilities. Accordingly, unlike the situation involving unbundled wholesale wheeling, for which the case law clearly supports a "functional" test, the Commission believes the case law and practical realities of a changing industry support an analysis of local distribution facilities based on the facilities' functional as well as technical characteristics.

While it would be preferable to draw an absolutely "bright" line (e.g., based on technical characteristics such as voltage), the Commission does not believe this is required by the case law and, importantly, would not be a workable approach in all cases because of the variety of circumstances that may arise and because utilities themselves classify facilities differently (e.g., one utility may classify a 69 kV facility as transmission; another may classify it as distribution).

Therefore, the Commission is adopting several indicators it will evaluate in determining whether particular facilities are transmission or local distribution in the case of vertically integrated transmission and distribution utilities:[99]

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[99]In the case of a distribution-only utility, which is franchised by a State or local government and sells only at retail, all of the circuits (and related wires, transformers, towers, and rights of way) which it owns or operates (regardless of voltage) would be local distribution facilities.

- Local distribution facilities are normally in close proximity to retail customers.
- Local distribution facilities are primarily radial in character.
- Power flows into local distribution systems, it rarely, if ever, flows out.
- When power enters a local distribution system, it is not reconsigned or transported on to some other market.
- Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
- Local distribution systems will be of reduced voltage.[100]

In summary, for unbundled wholesale wheeling the Commission will apply a functional test. The only definitive question will be whether the entity to whom the power is delivered is a lawful wholesaler. For unbundled retail wheeling the Commission will apply a combination functional-technical test that will take into account technical characteristics of the facilities used for the wheeling. The Commission concludes that these tests are consistent with the FPA, its legislative history and the case law discussed above.

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[100]The Commission has analyzed utilities' filings required by the Commission's regulations. These filings are made on FERC Form No. 1. While there is no uniform breakpoint between transmission and distribution, it appears that utilities account for facilities operated at greater than 30 kV as transmission and that distribution facilities are usually less than 40 kV.

APPENDIX G

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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18 CFR Part 35

[Docket Nos.RM95-8-001and RM94-7-002;Order No.888-A]

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

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Friday, March 14, 1997

Issued March 4, 1997.

SUMMARY: The Federal Energy Regulatory Commission (Commission) reaffirms its basic determinations in Order No. 888 and clarifies certain terms. Order No. 888 requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. Order No. 888 also permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and Federal Power Act section 211 transmission services. The Commission's goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.

* * *

I. Introduction and Summary

On April 24, 1996, the Commission issued Final Rules (Order Nos. 888 and 889) intended to remedy undue discrimination in the provision of interstate transmission services by public utilities and to address the stranded costs that may result from the transition to more competitive electricity markets.[1] At the heart of these rules is a requirement that prohibits owners and operators of monopoly transmission facilities from denying transmission access, or offering only inferior access, to other power suppliers in order to favor the monopolists' own generation and increase monopoly profits--at the expense of the nation's electricity consumers and the economy as a whole.

The electric utility industry today is not the industry of ten years ago, or even five years ago. While historically it was assumed that local utilities would be the only ones to generate and transmit power for their customers, today there is a broad array of potential competitors to supply power and widespread transmission facilities that can carry power vast distances. But competitors cannot reach customers if they cannot have fair access to the transmission wires necessary to reach those customers. It is against this industry backdrop that the Commission in Order No. 888 exercised its public interest responsibilities pursuant to sections 205 and 206 of the Federal Power Act (FPA), to reexamine undue discrimination in interstate transmission services and the effect of that discrimination on the electricity customers whom we are bound to protect under the FPA.

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[1]Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. 31,036, clarified, 76 FERC 61,009 and 76 FERC 61,347 (1996). Order No. 889 is an accompanying rule and specific rehearing arguments on that rule will be addressed separately.

We here reaffirm the legal and policy bases on which Order No. 888 is grounded. Utility practices that were acceptable in past years, if permitted to continue, will smother the fledgling competition in electricity markets and undermine the national policies reflected in the Energy Policy Act of 1992 to encourage the development of competitive markets. We firmly believe that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, as necessary to eliminate undue discrimination and protect electricity customers. The record supports our conclusion that, absent open access, undue discrimination will continue to be a fact of life in today's and tomorrow's electric power markets. As recent events clearly demonstrate, unbundled electric transmission service will be the centerpiece of a freely traded commodity market in electricity in which wholesale customers can shop for competitively-priced power.

The only way to effectuate competitive markets and remedy discrimination is through readily available, non-discriminatory transmission access. The Commission estimates the potential quantitative benefits from such access will be approximately $3.8 to $5.4 billion per year in cost savings, in addition to the non-quantifiable benefits that include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion.

Order No. 888 has two central components. The first requires all public utilities that own, operate or control interstate transmission facilities to offer network and point-to-point transmission services (and ancillary services) to all eligible buyers and sellers in wholesale bulk power markets, and to take transmission service for their own uses under the same rates, terms and conditions offered to others. In other words, it requires non-discriminatory (comparable) treatment for all eligible users of the monopolists' transmission

facilities. The non-discriminatory services required by Order No. 888, known as open access services, are reflected in a pro forma open access tariff contained in the Rule. The rule also requires functional separation of the utilities' transmission and power marketing functions (also referred to as functional unbundling) and the adoption of an electric transmission system information network.

The second central component of Order No. 888 was to address whether and how utilities will be able to recover costs that could become stranded when wholesale customers use the open access tariffs, or FPA section 211 tariffs,[2] to leave their utilities' power supply systems and shop for power elsewhere. Because of competitive changes occurring at the retail level, as numerous states have begun retail transmission access programs, Order No. 888 also clarifies whether and when the Commission may address stranded costs caused by retail wheeling and the extent of the Commission's jurisdiction over unbundled retail transmission. The Commission further addresses the circumstances under which utilities and their wholesale customers may seek to modify contracts made under the old regulatory regime, taking into account the goals of reasonably accelerating customers' ability to benefit from competitively priced power and at the same time ensuring the financial stability of electric utilities during the transition to competition.

137 entities filed requests for rehearing and/or clarification of Order No. 888. While these parties raise a variety of arguments--including legal, policy, and technical arguments--

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[2] Under section 211 of the FPA, the Commission, on a case-by-case basis upon application by an eligible customer, may order both public utilities and non-public utilities that own or operate transmission facilities used for the sale of electric energy at wholesale to provide transmission services to the applicant if it finds it is in the public interest to issue such order.

the majority (including a majority of public utilities) agree that we need to harness the benefits that competitive electricity markets can bring to the nation. The disagreements primarily focus on the mechanics of how we should do this, who should pay the costs of the transition to competition, and how long the transition should take.

First, parties disagree on what is necessary to remedy undue discrimination and to develop truly competitive wholesale markets. Many focus specifically on the tariff terms and conditions of good transmission access and seek changes in the Order No. 888 pro forma tariff. In response to these types of rehearing arguments, the Commission has fine-tuned or changed some of the pro forma tariff terms and conditions to better ensure that they do not permit discrimination and that they result in well-functioning markets. Other petitioners focus on additional structural changes which they believe are necessary, such as mandatory corporate restructuring (divestiture of generation assets) or mandatory creation of independent transmission system operators (ISOs). With regard to restructuring, the Commission continues to believe that functional unbundling of the utility's business, not corporate divestiture or mandatory ISOs, is sufficient to remedy undue discrimination at this time.

The most contentious arguments raised on rehearing involve how we deal with the transition costs associated with moving to competition. Some utilities have invested millions of dollars in facilities and purchased power contracts based on an explicit or implicit obligation to serve customers and the expectation that those customers would remain on their systems for the foreseeable future. These utilities face so-called "stranded costs" which, if not recovered from the customers that caused the costs to be incurred, could be shifted to other customers.

There are two basic categories of rehearing arguments regarding stranded cost recovery. Most utilities want a guarantee from this Commission that they will recover all stranded costs, whether caused by losing retail customers or wholesale customers. Many customers, on the other hand, want to be able to abrogate existing power supply contracts so that they can immediately leave their current suppliers' systems and shop for cheaper power elsewhere, without paying the sunk costs that their suppliers incurred on their behalf.

In response to these diverse arguments, the Commission has struck a reasonable balance that, for certain defined circumstances, permits utilities the opportunity to seek extra-contractual recovery of stranded costs from their departing customers and permits customers the opportunity to make a showing that their contracts should be shortened or terminated. Based on our experience in the natural gas area, we have learned that it is critical to address these issues early, but we also have chosen an approach different from that taken in the gas area because of the different circumstances facing the electric industry.

In balancing the wide array of interests reflected in the rehearing petitions, we have made a number of clarifications and granted rehearing on some issues, but we reaffirm the core elements and framework of Order No. 888. Since the time the final rules issued, as discussed in Section III, the pace of competitive change has continued to escalate in the industry at both the wholesale and retail levels as competitors, customers and state regulatory authorities aggressively seek ways to lower the price of electricity. We therefore believe it is all the more critical that we remedy undue discrimination in interstate transmission services now, and that we do so generically, if we are to fulfill our responsibilities under the FPA to protect consumers and provide a fair and orderly transition to new competitive markets.

Finally, with respect to environmental issues associated with this rulemaking, certain parties on rehearing continue to challenge the adequacy of our Final Environmental Impact Statement (FEIS). The central issues are whether the Final Rule will increase emissions of nitrogen oxides (NOx) from certain fossil-fuel fired generators, which could affect air quality in downwind areas to which these emissions may be carried, and the Commission's authority to mitigate environmental consequences.

We deny rehearing on the environmental issues raised and affirm our conclusion that we have satisfied our obligations under NEPA. As discussed in detail in the Final Rule, this rulemaking is expected to slightly increase or slightly decrease total future NOx emissions, depending on whether competitive conditions in the electric industry favor the utilization of natural gas or coal as a fuel for the generation of electricity. We also examined mitigation options over the longer term, and found that the preferred approach for mitigating any adverse environmental consequences would be for the Environmental Protection Agency (EPA) and the states to address the problem through regulatory authorities available under the Clean Air Act. The petitions for rehearing have not persuaded us to change this approach. Indeed, we note that since the issuance of Order No. 888, the EPA has concluded that the Rule is unlikely to have any immediate significant adverse environmental impact and thus concurred that the Commission's analysis is adequate under NEPA. We further note that EPA has recently taken steps under the Clean Air Act to address NOx emissions as part of a comprehensive emissions control program, along the lines endorsed by the Commission in the EIS.

In summary, the Commission believes that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so to eliminate undue discrimination and protect electricity customers. The measures required in Order No.

888 are necessary to remedy undue discrimination in interstate transmission services and provide an orderly and fair transition to competitive bulk power markets.

To assist the reader, we provide below a section-by-section summary of key elements of this Order on Rehearing.

Scope of the Rule

In this section we discuss petitions to rehear our requirement that transmission and power sales services be contracted for separately (unbundled). We reaffirm that this requirement is a reasonable and workable means of assuring non-discriminatory open access transmission. In doing so we refuse invitations to require that utilities under our jurisdiction divest themselves of generation or transmission assets. We do, however, make an important clarification involving how we will deal with existing contracts that contain so-called Mobile-Sierra clauses (clauses under which one or both parties agreed not to seek modification of contract terms unless they could show that it is contrary to the public interest not to permit the modification).

In Order No. 888 we concluded that contracts would not be abrogated by operation of the Rule. Instead, preexisting contracts would continue to be honored until such time as they were revised or terminated. We also found that those who were operating under pre-existing requirements contracts containing Mobile-Sierra clauses would nonetheless be allowed to seek reform of the contracts on a case-by-case basis. On rehearing we affirm that public utilities will be allowed to file to amend their Mobile-Sierra contracts for the limited purpose of providing an opportunity to seek recovery of stranded costs, without having to make a public interest showing that such cost recovery should be permitted. However, these utilities will have the burden, on a case- by-case basis, of showing that they had a reasonable expectation of continuing to serve the departing customer

after the contract term. We clarify that if the utilities under such contracts seek to modify provisions that do not relate to stranded costs, they will have the burden of showing that the provisions are contrary to the public interest.

We here make clear that, in turn, customers will be allowed to file to amend their Mobile-Sierra contracts to modify any contract term or to terminate the contract, without having to make a showing that the contract terms are contrary to the public interest. Instead, customers seeking modifications must demonstrate that the provisions they wish modified are no longer "just and reasonable." We reaffirm our conclusion in the Final Rule that if a customer seeks to shorten or eliminate the term of its contract, however, any contract modification approved by the Commission will provide for appropriate stranded cost recovery by the customer's supplying utility.

These various provisions meet the two-fold need to deal with stranded costs and the contracts under which those costs were incurred. However, as described in Order No. 888, the opportunity to reform Mobile-Sierra contracts extends only to a limited set of contracts--those entered into on or before July 11, 1994, for requirements power.

Comparability

In this section we deal with those requesting rehearing of our conclusions regarding what "comparable" service is, who is eligible for that service, and how it is to be implemented. We reaffirm our finding that, as a matter of law, we have jurisdiction over the rates, terms and conditions of unbundled transmission service provided to retail customers. We also clarify that we have authority to order "indirect" unbundled retail transmission services and that if such transmission is ordered by us in the future, or if it is provided voluntarily, otherwise eligible customers may obtain such service under the open access tariff. We expect public utilities to provide

such service in the future and, if they do not, we will not hesitate to order it.

We modify in two respects the definition of who is eligible for open access transmission service. First, we clarify that, with respect to service that this Commission is prohibited from ordering by section 212(h) of the Federal Power Act (retail wheeling directly to an ultimate consumer and "sham" wholesale wheeling), entities are eligible for such service under the tariff only if it is provided pursuant to a state requirement or is provided voluntarily. Second, we clarify that retail customers taking unbundled service pursuant to a state requirement (i.e., direct retail service) are eligible for such service only from those transmission providers that the state orders to provide service. These changes are made to make clear that our rules cannot be used to circumvent the proscriptions placed on the Commission against ordering direct retail wheeling.

Ancillary Services

In this section we deal with petitions to rehear our definitions of ancillary services--those services such as scheduling, voltage control, and supplemental reserve service that must or can attend the providing of transmission service--as well as the provisions involving these services. We reaffirm that tariffs must separately state the charges for these services. We do modify some of the definitions of these services to conform to industry needs and practices. Most importantly, we make clear that the transmission provider's sale of ancillary services associated with providing basic transmission service is not a wholesale merchant function and thus does not violate the standards of conduct imposed with Order No. 889.

Coordination Arrangements

The requirement to provide non-discriminatory open access transmission applies to any agreement between utilities that contains transmission rates, terms or conditions. This includes pooling arrangements and agreements between companies contracting to provide each other mutually beneficial transmission services. In Order No. 888 we laid out rules under which the open access comparability requirements would apply to tight and loose power pools, public utility holding companies and bilateral coordination agreements. We also set out principles that would govern our approval of independent system operator (ISO) agreements.

In this section we affirm the rules governing coordination agreements. In doing so we clarify the definition of "loose pool." We also make clear that, unlike in other situations where we require utilities to provide not only the services they provide themselves but those they could provide themselves, we will require members of loose pools to offer to third parties only those transmission services that they provide themselves under their pool-wide agreements.

We also reaffirm our strong commitment to the concept of ISOs and the ISO principles described in Order No. 888. In doing so we reject arguments that we should require that ISOs be formed. At the same time, we emphasize that while there is no "cookie-cutter" approach to forming an acceptable ISO, the requirement of fair and non-discriminatory rules of governance (Principle One) and the requirement that ISO employees have no financial interest in the economic interests of power marketers--backed by strict conflict of interest provisions--(Principle Two) are fundamental to our approving any ISO.

Pro Forma Tariff Provisions

The pro forma tariff is the basic mechanism implementing the requirements of comparable open access transmission. It provides the details of the transmission service obligations imposed on jurisdictional utilities by the Rule. On rehearing we affirm most of the provisions set out in Order No. 888 for the pro forma tariff. We do make changes to conform the pro forma tariff to changes adopted under other sections (for example, the definition of "eligible customer").

The rehearing petitions raised many questions about how particular aspects of the tariff will work. For the most part, these questions cannot be answered generically, but must be resolved on a case-by-case basis in the context of specific fact situations. However, the petitions brought to light issues that require clarifications and in some cases revisions to the tariff. The most significant of these involve discounting practices, provisions governing priority of service and curtailment, and the reciprocity provision.

Discounting practices. Originally, we provided different rules depending upon whether the transmission provider was offering a discount to itself or an affiliate or offering a discount to a non-affiliate. In response to the rehearing petitions, we are making three significant changes to the discounting requirements to better permit the ready identification of discriminatory discounting practices while also providing greater discount flexibility.

First, any discount offered on transmission services (including supporting ancillary services) by a transmission provider or requested by any customer must now be made only over the OASIS. With this change, all will have the same, timely access to discounted services. In making this change, we clarify that a transmission provider may limit its discounted service to particular time periods.

Second, once the provider and customer agree on a discount, the details of the discounted service--the price, points of receipt and delivery, and length of service--must be immediately posted on the OASIS.

Third, we revise our Rule respecting what other transmission paths must be offered at a discount. Originally, in Order No. 888, we required that when a discount was offered over one path, the transmission provider would have to provide that discount over all other unconstrained paths on its system. We will no longer require this. Instead, the discount will be limited to those unconstrained paths that go to the same point(s) of delivery as the discounted service being provided on the transmission provider's system. The discount will extend for the same time period and must be offered to all transmission service customers.

Priority and Curtailment. We affirm the right of first refusal policy that reservation priority continues for firm service customers served under a contract of one year or more. We also affirm that curtailment must be made on a pro-rata basis and clarify that non-firm point-to-point service is subordinate to firm service. However, we clarify that the pro-rata curtailment requirement extends to only those transactions that alleviate the constraint.

Reciprocity. In Order No. 888 we conditioned the use of a public utility's open access service on the agreement that, in return, it is offered reciprocal service by non-public utilities that own or control transmission facilities. Such reciprocal service does not have to be through an open access tariff, i.e., a tariff available to all eligible customers, but may be limited to those public utilities from whom the non-public utility obtains open access service. We affirm the reciprocity condition. In doing so, however, we make several clarifications.

First, a public utility is free to offer transmission service to a non-public utility without requiring reciprocal service in return. In other words, it may voluntarily waive the reciprocity condition. However, if it chooses to do so, transmission service must be provided through the pro forma tariff. Alternatively, bilateral agreements for transmission service provided by the public utility will not be permitted.

Second, we clarify that under the reciprocity condition a non-public utility must agree to offer the Transmission Provider any transmission service the non- public utility provides or is capable of providing on its system. This means that the non-public utility undertaking reciprocity must have an OASIS and must operate under the standards of conduct imposed under Order No. 889 unless it is granted a waiver by the Commission or, where appropriate, by a regional transmission group (RTG) of which it is a member. We also clarify that a non- public utility cannot avoid its responsibilities by obtaining transmission service through other transmission customers. Further, the seller as well as the buyer in the chain of a transaction involving a non-public utility will have to comply with the reciprocity condition.

Third, we adhere to our decision not to treat generation and transmission (G&T) cooperatives and their member distribution cooperatives as a single unit. Thus, the reciprocity provision extends to the G&T Cooperative and not to its member distribution cooperatives.

Fourth, we clarify the "safe harbor" provision under which a non-public utility may get a Commission decision that its transmission tariff suffices to meet reciprocity. A non-public utility may limit the use of any reciprocity tariff that it voluntarily files at the Commission to those transmission providers from whom the non-public utility obtains open access service. A non- public utility also may satisfy reciprocity through bilateral agreements with a public utility. As a related matter, if a public utility believes a non-public

utility is violating the reciprocity condition, it may file with the Commission a petition to terminate its service to the non-public utility.

Fifth, we clarify that non-public utilities may include stranded cost provisions in their reciprocity tariffs.

Sixth, the order on rehearing removes the term "interstate" from the reciprocity provisions. This is to make clear that reciprocity applies even to those who do not own or control interstate transmission facilities; i.e., foreign utilities and those located in the ERCOT region of Texas.

As to local furnishing bonds held by some public utilities, we clarify that all costs associated with the loss of tax-exempt status of those bonds caused by providing open access transmission service are properly considered costs of providing that service. This includes costs of defeasing, redeeming, and refinancing those bonds.

Other Clarifications. In this order on rehearing we take the opportunity to clarify various other tariff provisions. Among these: Transmission providers do not have to take service under the open access tariff for transmitting power purchased on behalf of their bundled retail customers. Also, the ability to reserve capacity to meet the reliability needs of a transmission provider's native load applies equally to present transmission and transmission that is built in the future.

Implementation

On rehearing, we make no substantive changes to the implementation provisions originally required under Order No. 888. For the most part, the implementation process has been completed. Utilities have made the requisite tariff and compliance filings and public and non-public utilities have, through other orders, been provided guidance as to obtaining waivers of Order No. 888 and Order No. 889 requirements.

We emphasize that we do not require the abrogation of existing contracts. Rather, the Rule requires only that transmission providers offer transmission under the open access tariff in addition to existing service obligations. Commitments made under existing contracts will continue. Of course, both transmission providers and their customers may seek to revise the terms and conditions of existing contracts by making the necessary filings, as appropriate, under Sections 205 or 206 of the Federal Power Act.

State and Federal Jurisdiction

On rehearing we reaffirm our decision that when transmission service is provided to serve retail customers apart from any contract for the retail sale of power, i.e., when it is provided on an unbundled basis, that transmission service is under our jurisdiction. In today's market, and increasingly in the future as more states adopt retail wheeling programs, retail transactions are, and will be, broken down into products that are sold separately--transmission and generation--and sold by different entities. The exercise of our jurisdiction over the rates, terms and conditions of unbundled retail transmission will, therefore, become more important. We also recognize that states have jurisdiction over facilities used for local distribution.

On rehearing we also reaffirm the seven-factor test of Order No. 888 to distinguish transmission under our jurisdiction from state-jurisdictional local distribution. In doing so, we recognize that our test does not resolve all possible issues. There may be other factors that should be taken into account. The test, therefore, is designed for flexibility to include unique local characteristics and usages. To that end, we will continue to defer to state findings on these matters.

In addition, we clarify that states have the authority to determine the retail marketing areas of the electric utilities

within their respective jurisdictions. We also recognize that states have the concomitant authority to determine the end user services these utilities provide.

Stranded Costs

On rehearing, we reaffirm our basic decisions surrounding the recovery of stranded costs. Utilities will be allowed the opportunity to seek to recover legitimate, prudent, and verifiable wholesale stranded costs. This opportunity is limited to costs associated with serving customers under wholesale requirements contracts executed on or before July 11, 1994 that do not contain explicit stranded cost provisions; and costs associated with serving retail- turned-wholesale customers.

We clarify that we will consider on a case-by-case basis whether to treat a contract extended or renegotiated without a stranded cost provision as an existing contract for stranded cost purposes.

In each case, the opportunity to seek stranded costs is limited to situations in which there is a direct nexus between the availability and use of a Commission-required transmission tariff and the stranding of the costs. The Rule does not allow the recovery of costs that do not arise from the new, accelerated availability of non-discriminatory transmission access.

The Commission also reaffirms its decision that stranded costs should be recovered from the customer that caused the costs to be incurred. The Commission is not requiring other remaining customers, or the utility, to shoulder a portion of its stranded costs that meet the requirements for recovery.

The Commission, as described in Order No. 888, will be the primary forum for addressing the recovery of stranded

costs caused by retail-turned-wholesale customers. With respect to such cases, we have made several changes.

First, the Commission has reconsidered its decision respecting cases involving existing municipal utilities that annex retail customer service territories. Under Order No. 888, we found that in such cases the Commission should not be the primary forum for determining stranded cost recovery. On rehearing we now find that such cases should fall within our province.

Second, we clarify that the opportunity for recovery of stranded costs associated with retail-turned-wholesale customers applies regardless of whether the customer or its new supplier is the one requesting and contracting for the transmission service. To this end, we have revised the definition of "wholesale stranded cost."

With respect to the recovery of stranded costs caused by unbundled retail wheeling, we affirm that the only circumstance in which we will entertain requests for these types of costs is when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required. We clarify that if a state regulatory authority has in fact addressed such costs, regardless of whether it has allowed full recovery, partial recovery or no recovery, utilities may not apply to the Commission to recover stranded costs caused by the retail wheeling.

Other

In this section we resolve questions concerning our information reporting requirements, regional transmission groups, and the special situations posed by utilities in the Pacific Northwest and by federal power marketing and similar agencies. Here we make some minor clarifications but make no significant changes to Order No. 888.

We are not persuaded that the information reporting requirements need to be changed at this time. Finally, we reject arguments that would have us fix generically any particular rate methodology for providing open access transmission service under the pro forma tariff.

* * *

III. Background

In the Final Rule, we detailed the events that led up to this rulemaking, including the significant technical, statutory and regulatory changes that have occurred in the electric industry since the FPA was enacted in 1935.[4] In particular, we focused on the competitive influences of the Public Utility Regulatory Policies Act of 1978, the Congressional mandate in the Energy Policy Act of 1992 to encourage competition in electricity markets, and the need for reform in the industry if consumers are to achieve the benefits that greater competition can bring.

In the ten months since the Final Rule issued, competitive changes have escalated at an even faster pace in virtually all areas of the electric industry. These changes are driven not only by the Commission's Final Rule, but also by state restructuring initiatives and by continuing pressures from customers to take advantage of emerging competitive markets and the lower electricity rates they can bring.

All of the existing 166 public utilities that own, control or operate interstate transmission facilities (listed as Group 1 and Group 2 utilities in the Final Rule) have filed the Order No. 888 pro forma open access tariff or requested a waiver of the requirement. Similarly, they either have adopted an electronic information network or requested a waiver of the

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[4]FERC Stats. & Regs. at 31,638-52; mimeo at 13-51.

requirement. Five non-public utilities have submitted reciprocal transmission tariffs and more than 20 have requested a waiver of the reciprocity condition in the pro forma tariff.[5]

Significant competitive changes also have accelerated with respect to power pooling, state restructuring initiatives, and Independent System Operators (ISOs). Under Order No. 888 and subsequent implementation orders, the Commission required the filing of revised pooling agreements and joint pool- wide transmission tariffs by December 31, 1996, in order to remedy undue discrimination in transmission services provided through interstate power pooling arrangements. Among the power pool filings were a New England (*NEPOOL*) comprehensive restructuring proposal, a New York proposal, a Pennsylvania-New Jersey-Maryland (PJM) compliance filing and a Western Systems Power Pool filing.

In response to the Commission's encouragement in Order No. 888 of ISOs as a possible means for accomplishing comparable access, a number of utilities and states are well underway in developing this new institution. The fundamental purpose of an ISO is to operate the transmission systems of public utilities in a manner that is independent of any business interest in sales or purchases of electric power by those utilities. The Commission has received several proposals for forming ISOs, one as part of the multi-docketed filing engendered by California's restructuring plan, and others relating to power pool filings. A number of regions are

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[5] As a condition of using a public utility's open access tariff, any user, including non-public utilities, must offer reciprocal comparable transmission access to the public utility in return. Order No. 888 provides a voluntary mechanism whereby non-public utilities can obtain Commission confirmation that what they are offering meets the tariff reciprocity condition. Non-public utilities also may seek a waiver of the reciprocity condition.

also developing ISO proposals. Some regions previously considering regional transmission groups (RTGs), whose primary purpose is regional planning of transmission facility construction and upgrades, have now broadened their discussions to include an ISO.

Investor-owned utilities in California, at the order of both the state commission and the legislature, have filed proposals with the Commission that would transfer control of transmission facilities to an ISO in conjunction with the formation of a state-wide power exchange to facilitate both wholesale and retail access. While the case presents many complex issues for the Commission to resolve, the California proposal is fundamentally compatible with the pro-competitive open-access requirements of Order Nos. 888 and 889. The Commission's open-access policies therefore have provided a framework for California, and other states, to explore customer choice initiatives.

Other major regions of the country also are instituting ISOs. Member utilities of the PJM Power Pool filed competing ISO proposals with the Commission and are currently working to reconcile the differences between their proposals. The New York Power Pool recently filed a proposal to create an ISO and a power exchange for New York. The New England Power Pool is exploring a new industry structure for its region that centers on the creation of an ISO. Utilities and other market participants in the Electric Reliability Council of Texas have also formed an ISO. Discussions are underway among utilities from Virginia to Wisconsin in an attempt to create a Midwestern ISO. Members of the Mid-America Power Pool are discussing an ISO proposal. In the Pacific Northwest, utilities are involved in negotiations intended to lead to the formation of an independent grid operator (Indego).

The combined available generation resources of the utilities in these groups is on the order of 428 GW out of a total of

approximately 732 GW for total U.S. resources (as of the end of 1996). Thus, assuming these ISO arrangements come to fruition, about three-fifths of the industry may have independent system operators controlling their transmission systems.

Moreover, every state but one has proposed or is considering or developing retail competition programs. For example, New Hampshire, Illinois and Massachusetts began pilot programs in the past year, and retail transmission service for these pilot programs currently is being taken pursuant to tariffs approved by both the state commissions and this Commission. The Massachusetts Department of Public Utilities has sent a proposal to the state legislature calling for retail competition to begin in January 1998. The New York Public Service Commission has issued an order proposing that retail competition begin in early 1998. The New Jersey Board of Public Utilities has issued a proposal permitting customer choice beginning in October of 1998. The Vermont Public Service Board has sent a plan to the legislature recommending that full customer choice begin by the end of 1998. The Arizona Corporation Commission has adopted rules to phase in competition over four years, beginning in January 1999. Recently, the Maine Public Utilities Commission issued a final report and recommendation to the legislature for retail competition to begin in January 2000. In addition, Rhode Island and Pennsylvania both have new laws requiring customer choice. These are only a few of the many state initiatives that are under way that will dramatically alter the structure of the electric industry.

Since Order No. 888 was issued, significant efforts also have been made to ensure that reliability of the transmission grid is maintained and that reliability criteria are compatible with competitive markets. The North American Electric Reliability Council (NERC) has continued its efforts to broaden its membership and to fashion reliability

requirements to fit a more competitive electric power industry. For example, the NERC Board of Directors voted to require mandatory compliance by all power market participants with its reliability standards. NERC is also establishing new entities called regional security coordinators to oversee the stability of grid operations and to direct the development of an extensive new communications network. Various NERC committees are considering ways to improve the tracking of power transactions, identify the network impacts of transactions, and reflect the actual flow of power over the network when making reservations for transmission service. These efforts are likely to intensify as the industry continues to adapt to competitive changes occurring in the marketplace.

Thus, all segments of the electric industry have taken significant steps in the past year in response to the emerging wholesale competitive markets enabled by Order No. 888 as well as state retail competition initiatives. The competitive framework established by Order No. 888, whose centerpiece is non- discriminatory transmission services and a fair and orderly stranded cost recovery mechanism, is critical to the successful transition to, and full development of, the industry restructuring proposals that are well underway in all major regions of the country.

IV. Discussion

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B. Legal Authority

In the Final Rule, the Commission responded to commenters challenging the Commission's authority to require open access and reaffirmed its conclusion in the NOPR that it has the authority under the FPA to order

wholesale transmission services in interstate commerce to remedy undue discrimination by public utilities.[59]

Rehearing Requests

Authority To Order Open Access Tariffs

Union Electric challenges the Commission's authority to require wheeling based on arguments that: (1) the Rule overlooks the fact that the AGD case[60] pertained to voluntary actions by the pipelines and the Commission's imposition of open access requirements as a condition on permitting the desired authorizations; (2) the Commission incorrectly treats the Otter Tail case;[61] (3) the legislative histories of the NGA and FPA are different and the legislative history of the FPA does not support the Commission's authority to order wheeling; (4) the Commission made prior contrary statements to the U.S.Supreme Court [in its opposition to the grant of certiorari to review the AGD decision] about the nature of Commission authority to order open access and judicial construction of that authority in AGD and Otter Tail;" (5) as a matter of statutory construction, the Commission cannot rely on sections 205 and 206, which are silent as to wheeling, when sections 211 and 212 contain express wheeling provisions; (6) the four relevant cases recognized by the Commission indicate that the Commission may not directly or indirectly order a public utility to wheel or transmit energy for another entity under sections 205 and 206, notwithstanding the Commission's circumscribed ability to order wheeling under sections 211 and 212; (7) prior to the issuance of the Final Rule the Commission, with a full

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[59] FERC Stats. & Regs. at 31,668-79 and 31,686-87; mimeo at 98-129 and 148- 51.

[60] Associated Gas Distributors v. FERC, 824 F.2d 981, 998 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (AGD).

[61] Otter Tail Power Company v. FPC, 410 U.S. 366 (1974) (Otter Tail).

appreciation of the legislative history behind Part II, consistently held that it lacks the authority to order wheeling under FPA Part II; (8) the Rule fails to assign "considerable importance" to the Commission's "longstanding interpretation of the statute in accordance with its literal language;" and (9) in legislative hearings preceding enactment of EPAct, the Office of the General Counsel acknowledged the limitations on the Commission's wheeling power.

Carolina P&L also challenges the Commission's authority to order open access tariffs, arguing that: (1) Otter Tail specifically states: "So far as wheeling is concerned, there is no authority granted the commission under Part II of the Federal Power Act to order it, * * *"; (2) the Richmond and FPL cases[82] prohibit the Commission from doing indirectly what it cannot do directly; (3) the AGD case does not support the Commission's authority to order open access through the filing of generic tariffs--in AGD the Commission's authority was based on voluntary actions by the affected pipelines and there are substantial differences between the NGA and the FPA; (4) the legislative history of EPAct indicates that the Commission does not have the authority to mandate open access and can only order open access if section 211 procedures are followed-- citing NYSEG and FPL; and (5) section 211 limits the Commission's authority to order open access on a generic basis--where a specific statute addresses an issue, a more general statute should not be read in a manner that conflicts with the specific statute.

PA Com argues that the Commission's reliance on AGD "impermissibly expands the limited holding of AGD" and the Commission improperly relied on sections 205 and 206 of

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[82] Richmond Power & Light Company v. FERC, 574 F.2d 610 (D.C. Cir. 1978) (Richmond) and Florida Power & Light Company v. FERC, 660 F.2d 668 (5th Cir. 1981), cert. denied sub nom. Fort Pierce Utilities Authority v. FERC, 459 U.S. 1156 (1983) (FPL).

the FPA to require open access generically--the Commission only has case-by-case jurisdiction.

VA Com declares that the plain meaning of the FPA and cases interpreting sections 206 and 211 show that the Commission does not have the authority to order industry-wide open access.

FL Com and El Paso argue that the Commission only has limited authority to order wheeling and that the Commission has not made the required findings under section 211.[63]

Group Two Section 205 Filings

Union Electric argues that the requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205.

Commission Conclusion

Overview

The fundamental legal question before us is the scope of the authority granted to the Commission in 1935 to remedy undue discrimination in interstate transmission services and whether that authority permits us sufficient flexibility to define undue discrimination in light of dramatically changed industry circumstances, in order to provide electricity customers the benefits of more competitively priced power. In the NOPR and Order No. 888, the Commission comprehensively examined case law and legislative history relevant to our authority to order open access transmission

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[63] We note that Indianapolis P&L also has made legal arguments regarding our authority to order wheeling under Order No. 888. However, it did so in a request for rehearing of a denial of its request for waiver of the Order No. 888 requirements, not in its request for rehearing of Order No. 888. Accordingly, we will address its arguments when we act on its request for rehearing of its waiver denial.

services as a remedy for undue discrimination.[64] We also responded at length in Order No. 888 to arguments that questioned our authority to take this step.[65]

On rehearing, as described above, only a few parties continue to question the Commission's authority. As a general matter their rehearings do not raise any arguments, cases, or legislative history not previously considered, and they do not convince us that our action in Order No. 888 is not within our authority under sections 205 and 206 of the FPA. We therefore reaffirm our determination that we have not only the legal authority, but the responsibility, to order the filing of non-discriminatory open access tariffs if we find such order necessary to remedy undue discrimination or anticompetitive effects.

There are several broad points we wish to emphasize in response to the rehearings that have been filed:

First, there is no dispute that the FPA does not explicitly give this Commission authority to order, sua sponte, open access transmission services by public utilities. However, the fact remains that the FPA does explicitly require this Commission to remedy undue discrimination by public utilities.[66] The finding of the D.C. Circuit in the AGD case, with regard to sections 4 and 5 of the NGA (which parallel sections 205 and 206 of the FPA), are equally applicable here: the Act "fairly bristles" with concerns regarding undue discrimination and it would turn statutory construction on its

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[64] FERC Stats. & Regs. at 31,668-73; mimeo at 98-112. Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, FERC Stats. & Regs. 32,514 at 33,053-56 (1995).

[65] FERC Stats. & Regs. at 31,673-79; mimeo at 112-129.

[66] See FERC Stats. & Regs. at 31,669-70; mimeo at 101-03.

head to let the failure to grant a general power prevail over the affirmative grant of a specific one."

Second, there also is no dispute that before Congress enacted the FPA in 1935, it rejected provisions that would have explicitly granted the Commission authority to order transmission to any person if the Commission found it "necessary or desirable in the public interest." However, the fact that Congress rejected an extremely broad common carrier provision does not limit the remedies available to the Commission to enforce the undue discrimination provisions in the FPA."

Third, entities on rehearing understandably have focused on statements in case law that indicate limits on the Commission's wheeling authority. They particularly focus on certain statements by the Supreme Court in Otter Tail. The Commission in Order No. 888 fully addressed and considered all relevant case law of which we are aware, including statements in Otter Tail and other court cases indicating limitations on our authority." We do not dispute these statements and we recognize limitations on our authorities. However, the fact remains that none of the cases cited, including Otter Tail, involved the issue of whether this Commission can order transmission as a remedy for undue discrimination and none addressed industry-wide circumstances such as those before us in Order No. 888.

Fourth, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access by both public utilities and non-public utilities, and broadened this case-by-case authority in 1992, Congress also specifically provided in section 212(e) of the FPA that the

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67 824 F.2d at 998.

68 See FERC Stats. & Regs. at 31,676-78; mimeo at 120-27.

69 See FERC Stats. & Regs. at 31,668-73; mimeo at 98-110.

case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law.[70] Indeed, the legislative history of EPAct shows that when Congress amended the section 211-212 wheeling provisions and the section 212(e) savings clause in 1992,[71] it was well aware of arguments regarding the scope of the Commission's wheeling authority as a remedy for undue discrimination under section 206. Whereas Congress in 1992 decided to add a flat prohibition on the Commission ordering direct retail wheeling under any provision of the FPA, it did not add a prohibition on the Commission ordering wholesale wheeling to remedy undue discrimination under section 206. It instead retained and modified the savings clause. The issue before us, therefore, hinges on the scope of authority given to this Commission to remedy undue discrimination, not on the scope of authority given to us in 1978 and 1992.

The Commission is significantly influenced by the decision and case law discussion by the D.C. Circuit in the AGD case. This court opinion contains the most recent and comprehensive discussion of the Commission's legal authority to remedy undue discrimination under NGA provisions that mirror those in the FPA, including the relevant case law concerning the Commission's authority to order transmission under the FPA.[72] The rehearing arguments do not, and we believe cannot, reconcile the AGD court's

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[70] See FERC Stats. & Regs. at 31,686-87; mimeo at 148-49.

[71] The savings clause in section 212(e) originally provided that no provision of section 210 or 211 shall be treated as "limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law." In 1992, the 212(e) savings clause was amended to provide that sections 210, 211 and 214 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."

[72] AGD, 824 F.2d at 996-999. See also FERC Stats. & Regs. at 31,668-73, 31,676-78; mimeo at 98-110 and 120-27.

discussion and findings with a conclusion that the Commission cannot under any circumstances (as these parties advocate) order wheeling under sections 205 and 206 to remedy undue discrimination.

In sum, we believe that the essential question of the Commission's legal authority to impose the requirements of Order No. 888 turns on the flexibility of the Commission's remedial authority under sections 205 and 206 of the FPA to remedy undue discrimination. As was true with respect to the natural gas industry, we acknowledge that Commission precedent for many years nurtured the expectation that we would not, under our authority under the FPA, preclude utilities from using their monopoly power over the nation's transmission systems to secure their monopoly position as power suppliers. However, as described at length in Order No. 888, these policies arose in the context of practical, economic, and regulatory circumstances that gave rise to vertically integrated monopolies and little, if any, competition among power suppliers. In this kind of regime, the interests of customers were most effectively served by the kind of cost-based regulatory regime that has prevailed until very recently. The evolution of third-party generation, facilitated by PURPA and significant technological advances, dramatically altered the economics of power production. The enactment of EPAct recognized these changes and established a national policy intended to favor the development of a competitive generation market, so that the efficiencies of the new marketplace will be available to customers in the form of lower costs for electricity. Utility practices that may have been acceptable a few years ago would, if permitted to continue, smother the fledgling competitive wholesale markets and undermine the efforts of customers to seek lower-price electricity. We firmly believe that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, if that is necessary to eliminate undue discrimination and protect electricity customers.

Specific Arguments[73]

The Factual Circumstances Underlying AGD Do Not Mandate A Different Conclusion In This Proceeding

Both Union Electric and Carolina P&L argue that the Commission cannot rely on AGD in support of its actions in the electric industry, and they attempt to distinguish the legal basis on which the Commission acted in requiring open access transportation for gas pipelines. Specifically, they argue that AGD (Order No. 436) pertained to voluntary actions by gas pipelines and that the Commission's imposition of open access requirements was a condition of certificate authorizations to transport gas, whereas the Commission's action in Order No. 888 is a direct mandate.[74] We believe this is a distinction without a difference. While it is true that the Commission required open access as a condition of granting blanket authorizations for pipelines and authorizations for pipelines authorizing pipelines to transport natural gas,[75] the critical point is that in both Order No. 436 and Order No. 888 the Commission's actions hinged as a legal matter on the parallel provisions of the NGA (sections 4 and 5) and the FPA (sections 205 and 206) that prohibit undue discrimination. Whether persons are seeking to transport natural gas or wheel electric power in interstate commerce, by law they must not unduly discriminate or grant undue preference.[76]

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[73] We do not repeat our lengthy legal analyses in Order No. 888, but discuss only those arguments that warrant further discussion.

[74] See Union Electric and Carolina P&L.

[75] These authorizations are issued under section 7 of the Natural Gas Act and section 311 of the Natural Gas Policy Act.

[76] While there is a difference in the statutes in that natural gas transporters must obtain a certificate from the Commission before they can transport gas, there is no difference in the statutory standard applied to the interstate service.

In AGD, the court upheld the Commission's reliance upon sections 4 and 5 of the NGA to impose an open-access commitment on any pipeline that secured a blanket certificate to provide gas transportation under section 7 of the NGA or provided transportation under section 311 of the NGPA.[77] Order No. 436 was not a simple order that relied on the "voluntary actions" of affected pipelines. As the court in AGD understood:

> The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry.* * *
>
> At stake is the role of interstate natural gas pipelines. Although they are obviously transporters of gas, they have until recently operated primarily as gas merchants. They buy gas from producers at the wellhead and resell it, mainly to local distribution companies ("LDCs") but also to relatively large end users. The Commission has concluded that a prevailing pipeline practice--particularly their general refusal to transport gas for third parties where to do so would displace their own sales--has caused serious market distortions. It has found this practice "unduly discriminatory" within the meaning of §5 of the NGA. Order 436 is its response.
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> The essence of Order No. 436 is a tendency, in the industry metaphor, to "unbundle" the pipelines' transportation and merchant roles. If it is effective, the pipelines will transport the gas with which their own sales compete; competition from other gas sellers (producers or traders) will give consumers the benefit of a competitive wellhead market. [78] Indeed, since Order No. 436 issued, virtually all

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77 824 F.2d at 997-98. The court also noted the Commission's reliance on section 16 of the NGA.

78 824 F.2d at 993-94.

jurisdictional natural gas pipelines became "open access" transporters of natural gas.

In analyzing the Commission's authority to remedy undue discrimination, the court never made the distinctions now being put forth by Union Electric and Carolina P&L. Rather, the court specifically focused on the Commission's authority under section 5 of the NGA and upheld the Commission's authority to remedy undue discrimination in the transportation of natural gas by requiring pipelines transporting natural gas to do so on a non-discriminatory basis.[79] Similarly, the Commission in Order No. 888 found undue discrimination in the transmission of electric energy and required, pursuant to section 206 of the FPA (the FPA provision that parallels section 5 of the NGA), that if public utilities transmit electric energy in interstate commerce, they must do so on a non-discriminatory basis (i.e., offer non-discriminatory open access transmission).

Moreover, while the Commission may have imposed a "condition" on pipelines obtaining blanket certificates or providing section 311 transportation in Order No. 436, this does not detract from the court's core finding in AGD that the Commission had the authority under section 5 of the NGA to remedy undue discrimination by requiring open access transportation.[80] The Commission chose in Order No.

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[79] For example, as the AGD court explained with regard to its discussion of Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985), "we made it clear that blanket-certificate transportation, unconstrained by any nondiscriminatory access provision, might well require remedial action under §5." 824 F.2d at 1000.

[80] We disagree with Union Electric that anything in the Commission's brief to the Supreme Court, opposing certiorari of AGD, contradicts our conclusion. We recognize, as the Commission explained in that brief, that there is no equivalent to section 7 of the NGA in the FPA. While this puts Order No. 888 on a somewhat different factual basis from AGD, it has no material effect on whether we have the

436 to impose its open access remedy as a condition to pipelines obtaining a blanket certificate to transport natural gas, but its authority was rooted in the undue discrimination provisions of section 5. Additionally, the practical result of the conditioning was that all jurisdictional pipelines would have to provide open access transportation, a result that was clearly anticipated by the AGD court.[81] Thus, there is no distinction in the result intended, or the result achieved, in either industry; in both cases, the intent was to remedy undue discrimination pursuant to the statutes governing each industry, and in both cases the result was that all transporters/transmitters must agree to open access non-discriminatory services if they seek to continue owning, controlling or operating monopoly interstate transportation facilities.

Legislative History Behind the FPA and EPAct Does Not Preclude Our Action

We disagree with the arguments that the legislative history behind Part II of the FPA establishes that the Commission cannot under any circumstance order wheeling under FPA sections 205 and 206.[82] We examined the legislative history of sections 205 and 206 at length in the NOPR and Order No. 888 and concluded that it supports our authority to order open access transmission as a remedy for undue discrimination.[83] We also have examined the legislative

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authority to remedy undue discrimination by requiring non-discriminatory open access transmission.

[81] See 824 F.2d at 993-94 ("The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry. * * *").

[82] Parties have raised the legislative history of sections 205 and 206, as well as the legislative history of the EPAct amendments to sections 211 and 212.

[83] FERC Stats. & Regs. at 31,676-78; mimeo at 120-27. Notice of Proposed Rulemaking and Supplemental Notice of Proposed

history of the EPAct amendments to sections 211 and 212 and conclude that Congress in EPAct did not resolve the issue of our authority under sections 205 and 206 and left untouched whatever pre-existing authorities we had under these sections. The parties have raised nothing new on rehearing to persuade us that our interpretation is wrong. However, there are several arguments that we believe warrant further discussion.

Parties on rehearing argue that the existence of sections 211 and 212 limit the Commission's wheeling authority and, in effect, remove our authority under section 206 to order any transmission as a remedy for undue discrimination.[84] We disagree. In enacting EPAct, Congress did not resolve the extent of our wheeling authority outside the context of sections 211 and 212.[85] As we explained above, while

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Rulemaking, FERC Stats. & Regs. 32,514 at 33,053-56 (1995). Union Electric points to a statement in the Commission's 1987 brief to the U.S. Supreme Court, opposing certiorari of the AGD case; in that brief the Commission pointed out that the Supreme Court had noted, in Otter Tail, that the legislative histories of the FPA and NGA are "materially different." As we explained in Order No. 888, we have thoroughly reexamined the legislative histories of the NGA and FPA with respect to this issue and now conclude that there is no material difference as to this issue in the legislative histories of the two statutes. Further, such a difference, whether or not it exists, was not crucial to the fundamental holdings of the AGD court and does not preclude that decision from applying equally in the electric industry. See FERC Stats. & Regs. at 31,676-78; mimeo at 121-26. We also note that in its brief to the Supreme Court the Commission explicitly stated that neither Otter Tail nor any of the other electric cases cited "presented the question whether the Commission could order wheeling to remedy undue discrimination or anticompetitive behavior. * * *" FERC Brief at 25 (footnote omitted).

[84] See discussion supra concerning AGD court's understanding that Order No. 436 was not a simple order that relied on voluntary actions of affected pipelines.

[85] Contrary to certain assertions, in Order No. 888 we viewed the statute as a whole and determined that section 211 in no way limited the

Congress in 1978 gave the Commission certain case-by-case authority to order transmission access, it also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law. Congress retained a similar savings clause when it amended sections 211 and 212 in 1992. Moreover, the legislative history of EPAct shows that when Congress amended sections 211 and 212, it was well aware of arguments regarding the scope of the Commission's remedial authority under section 206.[86] Whereas Congress added an amendment prohibiting the Commission from ordering direct retail wheeling under any provision of the FPA, it chose not to add a prohibition on the Commission ordering wholesale wheeling as a remedy for undue discrimination under sections 205 and 206.[87]

We are not persuaded that this conclusion is wrong based on rehearing arguments that we ignored other legislative history of EPAct. Carolina P&L argues that we ignored various statements of Senator Wallop following the enactment of EPAct, which it alleges are counter to our claim of authority to order open access transmission as a remedy for undue discrimination. The utility is simply in error that we ignored these statements. We explicitly mentioned

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broad authority Congress gave us to eradicate undue discrimination in the electric power industry.

[86] See note 71 and related discussion, supra.

[87] In response to Carolina P&L's argument that Congress gave the Commission a specific remedy under section 211 and the Commission should not presume that it has additional remedies in such a circumstance, we do not believe that section 211 can credibly be viewed either as a partial substitute for, or as superseding, the sections 205-206 undue discrimination remedial authority that is fundamental to the Federal Power Act. Indeed, section 211 is not written in terms of providing remedial authority to address undue discrimination but rather provides for case-by-case transmission service on request if the service is in the public interest and meets the other criteria in sections 211 and 212.

Senator Wallop's statements in Order No. 888 and gave our rationale for why section 211 does not limit our authority to remedy undue discrimination.[88] However, we believe it is important to elaborate on the context in which those statements were made and our interpretation of those statements.

The primary focus of Senator Wallop's statements is on the transmission authority given by the EPAct amendments to sections 211 and 212. These statements emphasize restrictions on our section 211 wheeling authority, including the fact that section 211 does not give the Commission authority to order transmission access on its own motion or to order open access transmission.[89] We do not quarrel with these statements because sections 211 and 212 clearly do place restrictions on our authority to order access under those provisions. The statements also discuss the differences between the House introduced amendments to sections 211 and 212 (which would have provided broader and in some instances mandatory access authority) and the amendments that finally passed (which were more limited). We also do not disagree that changes were made to the bill that originally was introduced. At issue here, however, is not whether there are restrictions on our section 211 authority, but rather whether we have authority outside the context of section 211 to order transmission as a remedy for undue discrimination. The only statement among Senator Wallop's remarks that addresses this specific issue is one in which he says, "In my opinion, neither the amendments made by this Act nor existing law give the FERC any authority to mandate open access transmission tariffs for electrical utilities." (emphasis added). We do not view one senator's opinion as in any way

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88 FERC Stat. & Regs. at 31,686-87; mimeo at 148-51.

89 Most of the statements talk in terms of "The Conference Report provides. . . ." and thus are referring only to the section 211 and 212 provisions. See, e.g., 138 Cong. Rec. 517616 (Oct. 8, 1992).

dispositive of the issue. As discussed supra, when Congress enacted the 1992 section 211 amendments it was well aware of the outstanding legal issue of the Commission's authority to order access as a remedy for undue discrimination under section 206. It chose not to clarify this issue by prohibiting the Commission from ordering access, but instead retained the savings clause in section 212(e).

The issue of our legal authority thus turns on the undue discrimination authority given to us in 1935, and the legislative history of sections 205 and 206. We discussed this at length in Order No. 888.[98] On rehearing, several entities emphasize the Otter Tail case and the legislative history referred to in that case. In particular, Union Electric recites Justice Stewart's discussion of the legislative history in his partial dissent in Otter Tail. We do not interpret that discussion to suggest that we do not have the authority to remedy undue discrimination by requiring open access transmission under any circumstance. As we explained in Order No. 888:

In the FPA, while Congress elected not to impose common carrier status on the electric power industry, it tempered that determination by explicitly providing the Commission with the authority to eradicate undue discrimination--one of the goals of common carriage regulation. By providing this broad authority to the Commission, it assured itself that in preserving "the voluntary action of the utilities" it was not allowing this voluntary action to be unfettered. It would be far-reaching indeed to conclude that Otter Tail, which was a civil antitrust suit that raised issues entirely unrelated to our authority under section 206, is an impediment to achieving one of the primary goals of the FPA--eradicating undue

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[98] FERC Stats. & Regs. at 31,676-78; mimeo at 120-27.

discrimination in transmission in interstate commerce in the electric power industry.[91]

In response to Union Electric's arguments that Congress explicitly rejected common carrier provisions in 1935, we do not disagree with Union Electric's statement that "the mandatory wheeling language was not dropped inadvertently."[92] The point that we made in Order No. 888 (quoting AGD) in this regard was that

(1) "Congress declined itself to impose common carrier status" (emphasis added) and (2) there is no "support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty."[93]

Nowhere did we ever suggest that the mandatory wheeling language was dropped inadvertently; we simply distinguish a general common carrier obligation imposed "in the public interest" from an obligation to provide transmission service deemed necessary to eliminate undue discrimination. Finally, we fully agree with Union Electric's statement that [a]lthough this "first Federal effort" occurred in 1935, the resulting FPA Sections 205 and 206 have not been modified in any relevant respect since that time. Therefore, the range of authority conveyed to the Commission in such sections remains the same today as it did then.[94]

We never suggested otherwise and our conclusion in Order No. 888 is not based on a finding to the contrary.

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91 FERC Stats. & Regs. at 31,670; mimeo at 103.

92 Union Electric at 26.

93 FERC Stats. & Regs. at 31,677; mimeo at 122.

94 Union Electric at 27.

Case Law Does Not Prohibit Our Ordering Wheeling Under Sections 205 and 206 of the FPA

Union Electric, discussing the very cases cited by the Commission in Order No. 888, asserts that "the Commission fails to recognize their dispositive results prohibiting it from ordering wheeling under the Sections 205 and 206 of the FPA."[95] We thoroughly examined all of the case law cited by Union Electric, as evidenced by our discussions in the NOPR and Order No. 888, and disagree that any of those cases prohibit the Commission from ordering wheeling under sections 205 and 206 of the FPA to remedy undue discrimination. Indeed, the AGD court reached the same conclusion.[96]

Union Electric further cites to a variety of FPC cases that it claims demonstrate that the Final Rule exceeds the Commission's statutory authority.[97] It appears to have proffered every negative Commission statement it could find with respect to our authority to order wheeling under Part II of the FPA. As in the Commission cases cited, we recognize that our authority to order transmission service is not unbounded; if we order transmission, it must be within the scope of authority available to us under the FPA. However, the fact is that none of the cases cited as establishing limits on the Commission's authority addresses the issue before us now, i.e., the Commission's authority to order transmission as a remedy for undue discrimination. Simply stated, the Commission has never before been faced with generic findings of undue discrimination in the provision of interstate

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[95] Union Electric at 30.

[96] The only relevant case the AGD court did not discuss was NYSEG. As we explained in Order No. 888, presumably this was because the case did not concern whether the Commission could order wheeling as a remedy for undue discrimination. FERC Stats. & Regs. at 31,672 n.217; mimeo at 108 n.217.

[97] Union Electric at 33-37.

electric transmission services, and the extent of its authority to remedy that undue discrimination.

The Commission's General Counsel Never Asserted, or Even Suggested, That the Commission Does Not Have the Authority to Order Wheeling as a Remedy for Undue Discrimination

Union Electric spends several pages of its rehearing request asserting that the Commission's own General Counsel has acknowledged the limitations on the Commission's authority to order wheeling.[98] In particular, it points to a statement by a Commission OGC witness that "if Congress intends for the Commission to be able to deal with transmission on its own motion and thereby go further than simply dealing with industry proposals," Congress would need "to include an affirmative statement somewhere in the Act that the Commission could require wheeling on its own motion."[99] This same statement was previously raised by EEI and previously addressed in Order No. 888. We do not disagree that this statement was made. However, it must be read in the context of the witness' entire testimony in which the witness stated four times the view that the case law supports the argument that the Commission has authority to order wheeling as a remedy for undue discrimination.[100] Indeed,

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[98] Union Electric at 37-40.

[99] Union Electric at 38-39.

[100] Hearings on H.R. 1301, H.R. 1543, and H.R. 2224 before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. (May 1, 2 and June 26, 1991), Statement of Cynthia A. Marlette, Associate General Counsel, Federal Energy Regulatory Commission, Report No. 102-60 at 60 ("However, as discussed below, there are strong legal arguments that the Commission's obligation to protect against undue discrimination carries with it the authority to impose transmission requirements as a remedy for undue preference or discrimination." "As discussed below, although the case law in this area has been uncertain, in OGC's opinion there is a strong

contrary to Union Electric's assertion, the extensive legal analysis set forth by the Commission's witness supports the position relied upon in this proceeding.[101] Thus, viewed in the context of the witness' entire testimony, Union Electric's arguments to the contrary are unavailing. Moreover, nowhere did the witness ever suggest, as asserted by Union Electric, that FPA sections 205 and 206 could only be used "to eliminate unduly discriminatory terms in a wheeling arrangement voluntarily filed with the Commission."[102]

The Commission Has the Authority to Order Public Utilities to Make Rate Filings in This Proceeding

We reject Union Electric's argument that our requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205. It is true that the Commission ordinarily cannot require a utility to make a section 205 filing. However, in this situation the section 205 filing was required as a remedy under section 206 of the FPA to establish rates for non-discriminatory open access transmission. Acting pursuant to section 206 of the FPA, we found that undue discrimination

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legal argument that the Commission can require transmission as a remedy for undue preference or undue discrimination."); at 69-70 ("The weight of the limited case law, particularly the AGD opinion, supports authority to order wheeling as a remedy for undue discrimination where substantial evidence exists."); at 106 ("I believe that we have substantial authority under the existing case law to mandate access where necessary to remedy anticompetitive effects.").

[101] The statement quoted was preceded by a legal analysis of the Commission's authorities under then existing law, including section 206, and a statement that an examination of the Commission's full authorities might further open up the industry. Further, it was made in the context of case- by-case industry proposals and the Commission's inability to require case- by-case wheeling on its own motion. It did not address section 206 authority to remedy undue discrimination.

[102] Union Electric at 39. We note that Union Electric did not cite to any page or particular language to support its assertion.

exists in the wholesale transmission of electric power and ordered the filing of non-discriminatory open access transmission tariffs to remedy this discrimination. Section 206 further requires that upon such a finding the Commission "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force. * * *" Thus, we had the authority to set the rates that would be observed and in force following the effectiveness of open access transmission and initially proposed to set rates for each public utility. However, rather than take this intrusive approach, which necessarily would have required a number of generic assumptions and resulted in less than public utility-specific rates, upon issuance of the Final Rule, we chose to permit these public utilities to make section 205 filings to propose their own rates for the services provided in the pro forma tariff.

The Commission's Prior Failure to Order Wheeling as a Remedy for Undue Discrimination Is Not Dispositive

After discussing several cases that it asserts address the Commission's authority to remedy undue discrimination, Carolina P&L declares that "[p]erhaps the strongest evidence that the Commission lacks the power to compel wheeling under FPA section 206 is the fact that the Commission has never previously exercised this alleged power, despite numerous opportunities to do so."[103] However, the court in AGD succinctly dismissed a similar argument:

It is finally argued that the Commission's not having imposed any requirements like those of Order No. 436 in the period from enactment in 1938 until the present demonstrates the lack of any power to do so. * * * But as our introductory review of the economic background sought to illustrate, the Commission here deals with conditions that are altogether

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[103] Carolina P&L at 35-36.

new. Thus no inference may be drawn from prior non-use.[104]

Undue Discrimination/Anticompetitive Effects[105]

A number of utilities and state commissions argue that the Commission lacks evidence to support a finding of undue discrimination.[106]

VA Com argues that the Commission failed to make a legally supportable finding of industry-wide undue discrimination: "FERC apparently drew a conclusion that there was undue discrimination in the NOPR without support and later accepted customers' allegations, without further inquiry, and relied on them in making its finding of industry-wide undue discrimination." (VA Com at 2-3).

PA Com and Carolina P&L assert that allegations of undue discrimination do not form a sufficient basis to compel a generic rulemaking. Not coming forward with specific accusations and the identity of specific accusers, PA Com asserts, is unconstitutional as a deprivation of due process.

With regard to specific allegations of undue discrimination, SoCal Edison argues that the Commission inappropriately relied upon allegations involving SoCal Edison as evidence of undue discrimination. SoCal Edison asks that the Commission declare that it is not making a factual determination as to any particular allegation especially since prior to 1994 the Commission defined discrimination

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104 824 F.2d at 1001. In this regard, we acknowledge that our view of what constitutes undue discrimination has evolved significantly in light of the dramatic economic changes in the industry, as described briefly above and more fully in Order No. 888.

105 FERC Stats. & Regs. at 31,682-84; mimeo at 136-42.

106 E.g., El Paso, Union Electric, Carolina P&L, VA Com, FL Com, PA Com.

differently. Dalton similarly argues that the Commission has no basis for finding that Georgia Power Company is engaged in unlawful undue discrimination as to new or roll-over transmission services in the operation of the Integrated Transmission System in Georgia (ITS) under the ITS agreement. Moreover, Dalton argues, even if it is found that GPC acted in unduly discriminatory manner, it is not practical or lawful to order open access tariff for new and roll-over services.

Finally, Carolina P&L argues that the comparability standard does not eliminate the "requirement" that parties must be similarly situated before discrimination is present, and that the Commission has not provided factual support for its implicit finding that public utilities and their native load customers are similarly situated to third parties. It cites *City of Vernon v. FERC*, 845 F.2d 1042 at 1045-46 (D.C. Cir. 1988), in support.

Commission Conclusion

As an initial matter, the Commission grants SoCal Edison's request for clarification that in Order No. 888 we did not make a factual determination as to any particular allegation of past discrimination described in the Final Rule.[107] However, we reject arguments that the Commission cannot rely in part on the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the NOPR. The specific allegations are illustrative. However, they present examples of the types of discriminatory incentives and behavior

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[107] In response to PA Com's and Carolina P&L's assertions that not coming forward with specific accusations and identities of specific accusers is unconstitutional and a deprivation of due process, we emphasize that the Commission has not denied due process to anyone. The Final Rule does not, nor is it intended to, make specific findings as to any particular utility or any particular allegation raised.

inherent in ownership of monopoly transmission facilities, and also present credible examples of the types of discriminatory behavior in which public utilities could engage in the future. We also reject arguments that customers and the Commission must litigate and make specific findings of discrimination against each public utility before we can take any action to preclude discriminatory behavior that will harm competition and, ultimately, electricity consumers. This is particularly true where the discriminatory behavior clearly is in the economic self-interest of a monopoly transmission owner facing the markedly increased competitive pressures that are driving today's electric utility industry. As we recognized in Order No. 888,

[t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices. As the *AGD* court stated: "Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[108]

We believe that the same general discriminatory circumstances that faced us when we required open access transportation in the natural gas industry[109] are also before us today in the electric industry. First, it is uncontested that market power continues to exist in the ownership and operation of the monopoly-owned facilities that comprise the nation's interstate transmission grid. Second, utilities, as a general matter, did not in the past offer comparable transmission services to competitors or to customers. Open

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[108] FERC Stats. & Regs. at 331,682; mimeo at 136-37.

[109] See AGD, 824 F.2d at 999-1000.

access services simply were not made available by utilities until the late 1980s when the Commission began to impose open access as a condition of approval of market-based rates and utility mergers in order to mitigate market power and remedy anticompetitive effects. Rather, the vast majority of utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales. Third, discrimination in transmission services, when viewed in light of utilities' own uses of their transmission systems compared to what they offer third parties, has denied and will continue to deny customers access to electricity at the lowest reasonable rates. The entities on rehearing have raised nothing to persuade us that it is in the interests of consumers to maintain the self-evident incentives for transmission owners to exercise their monopoly power over transmission to discriminate in favor of their own generation sales--incentives that will only increase in the future as competitive pressures continue to escalate.

The Commission addressed the same argument as that being made by Carolina P&L, that the Commission has not made the requisite finding that third-party transmission customers are similarly situated to public utilities and their native load customers, in 1994 in the *NEPOOL* and AEP cases.[110] In these cases, we recognized that the traditional focus of our undue discrimination analysis had been whether factual differences justify different rates, terms and conditions for similarly situated customers, but concluded that due to changing conditions in the electric utility industry, it was necessary to reevaluate our traditional analysis. As we stated in *NEPOOL*, the focal point of undue discrimination claims has shifted from claims of undue discrimination in

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[110] New England Power Pool, 67 FERC 61,402 (1994) (NEPOOL); American Electric Power Service Corporation, 64 FERC 61,279 (1993), reh'g granted, 67 FERC 61,168, clarified, 67 FERC 61,317 (1994) (AEP).

rates and services which the utility offers different customers to claims of undue discrimination in rates and services which the utility offers when compared to its own use of the transmission system.[111] "In this context, framing the analysis in terms of how a public utility treats similarly situated customers is not applicable or instructive."[112] The Commission concluded that it therefore must reexamine its application of the standard for undue discrimination claims under sections 205 and 206 of the FPA.

The Commission further elaborated on its re-examination of undue discrimination in AEP. The Commission cited its *NEPOOL* discussion and set for hearing the different uses that AEP made of its transmission system and whether there were any operational differences between any particular use that AEP made of the system and the use third parties might need, and, in particular, the degree of flexibility AEP accorded itself in using its transmission system for different purposes. The Commission subsequently set the same issue for hearing in several other cases.[113] In the NOPR, however, the Commission concluded that based on what it had learned in the ongoing cases, it would address this issue generically in this rulemaking. We announced in the NOPR our belief that all utilities use their own systems in two basic ways: to provide themselves point-to-point transmission service that supports coordination sales, and to provide themselves network transmission service that supports the economic dispatch of their own generation units and purchased power resources (integrating their resources to meet their internal load). Third parties may need one or both of these basic uses in order to obtain competitively priced generation or to have

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[111] 67 FERC 61,042 at 61,132.

[112] *Id.*

[113] Commonwealth Edison Co., 70 FERC 61,204 (1995); Wisconsin Electric Power Co., 70 FERC 61,074 (1995); and Wisconsin Public Service Corp., 70 FERC 61,075 (1995)

the opportunity to be competitive sellers of power, and the Commission proposed that all public utilities must offer both services on a non-discriminatory open access basis.[114]

We affirmed this determination in the Final Rule. We concluded that a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. Because a public utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may not be using or providing that service today.[115] Thus, based on the analysis in this record, the Commission has determined that undue discrimination in the provision of transmission services in today's industry does not turn on whether utilities and their native load customers are similarly situated to third parties, but instead turns on whether the utility is providing comparable service, that is, service that it is reasonably capable of providing to other users of the interstate transmission system.

In short, the Commission is not bound to a static application of its undue discrimination analysis under the FPA and, indeed, has a public interest responsibility to reexamine undue discrimination in light of changed circumstances in the industry.[116] That is what we began in *NEPOOL* and AEP and have completed in this rulemaking.

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114 FERC Stats. & Regs. 32,524 at 33,079.

115 FERC Stats. & Regs. at 31,690; mimeo at 160.

116 There is no "requirement" in the FPA that the Commission apply a "similarly situated" test. Carolina P&L's reliance on City of Vernon is misplaced. That case involved a claim of discrimination in the type of service offered to a wholesale customer versus that offered to retail customers, and the Commission's application of the "similarly situated" and "same service" test. Contrary to Carolina P&L's implication, the case does not hold that the Commission is bound to apply a "similarly situated" test in analyzing undue discrimination claims under the FPA.

The traditional "similarly situated" test, while applicable to discrimination among third-party customers, simply is not applicable when analyzing discrimination between third-party transmission customers and transmission owners. Under Carolina P&L's theory, presumably the only customers that could be shown to be similarly situated would be those who own monopoly transmission facilities and have native load (i.e., captive) customers. This would preserve customer captivity, perpetuate monopoly power and profits, and deny the lowest reasonable rates to consumers. We therefore reject Carolina P&L's arguments.

Moreover, the fact that public utilities and their native load customers have been treated differently from third-party transmission customers because they are not among those traditionally considered to be "similarly situated" is precisely the target at which Order No. 888 takes aim. Historically, competitively-priced power was not broadly available to wholesale customers because the industry was dominated by vertically integrated IOUs[117] and, to the extent cheaper generation alternatives were available in the marketplace, transmission owners either took the cheaper power for their own uses or purchased and re-sold it at a profit.[118] Prior to EPAct, most power customers took power from the vertically integrated utilities that provided their transmission service. Transmission-only transactions played a secondary role in bulk power markets, facilitating certain economy transactions and coordination and pooling arrangements that improved utility operational efficiencies, largely as a complement to bundled bulk power transactions. Given the predominantly

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117 I.e., investor-owned utilities that owned generation, transmission and distribution facilities and most of whom had captive customers.

118 Very simply, the transmission owner was able to prevent third parties from achieving the maximum savings possible in the generation market by withholding or delaying transmission service. Alternatively, the transmission owner could purchase the power and resell it to the third party at a rate that reflected a mark-up from the first power sale.

vertically-integrated industry and efficiencies that could be gained through encouragement of coordination and pooling transactions, the Commission was willing to accept utility practices that provided third parties with transmission services that were distinctly inferior to the utility's own uses of the transmission system.

In the future, however, unbundled transmission service will be the centerpiece of a freely traded commodity market in electricity, in which all wholesale customers can shop for power. In a market characterized by a significant increase in non-vertically integrated power suppliers and competitively priced power that is now meaningfully available, it is no longer in the interest of wholesale customers for the Commission to tolerate the types of practices that were previously accepted. We cannot allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace. Accordingly, a primary goal of Order No. 888 is to provide that in the future transmission providers and third-party transmission customers are "similarly situated" in the quality of transmission service available to them.

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C. Comparability

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5. Reservation of Transmission Capacity for Future Use by Utility

In the Final Rule, the Commission concluded that public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonably forecasted within the utility's current

planning horizon.[140] However, the Commission determined that any such capacity that a public utility reserves for future growth, but is not currently needed, must be posted on the OASIS and made available to others through the capacity reassignment requirements, until such time as it is actually needed and used.

Rehearing Requests

CCEM argues that it is discriminatory to allow public utilities and network transmission customers to reserve existing transmission capacity for their native load growth because it (1) limits the determination of ATC, (2) is likely to increase the cost of transmission for other customers, and (3) is inconsistent with a capacity reservation-based system. CCEM argues, however, that if the reservation feature is retained, franchise utilities that reserve capacity must pay the full reservation charges, with no cost shifting to other customers. CCEM further recommends that all reservation payments should be credited directly to firm transmission services and the planning horizon should be limited to a reasonable time into the future.

American Forest & Paper argues that to achieve comparability, utilities must not be permitted to withhold capacity from the market for the benefit of native load. American Forest & Paper further argues that the Commission must establish mechanisms for evaluating the reasonableness of the utilities' requirements and projections, otherwise they have an incentive to over-forecast and to extend their planning horizons. American Forest & Paper suggests that requiring utilities to establish separate entities to purchase transmission on behalf of their native load would help solve this problem.

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[140] FERC Stats. & Regs. at 31,694; mimeo at 172.

VA Com requests that the Commission clarify what will happen if a utility's forecast of load growth is too low. It argues that native load should not have to bear the burden of any forecast errors and that utilities should be required to reserve sufficient capacity to serve the current and projected needs of native load customers. VA Com would also have the definition of native load in section 1.19 of the tariff expanded to include existing distribution cooperatives and others who currently provide service to end users. With respect to reservation priority, VA Com states that the Commission should establish the following reservation priority: native load customers, firm contract customers, and non-firm customers. Finally, VA Com asserts that the calculation of ATC must not include any capacity that may be needed by native load customers.

Commission Conclusion

We will deny the requests of CCEM and American Forest and Paper. We continue to believe that public utilities should be allowed to reserve existing transmission capacity needed for native load growth and network customer load growth reasonably forecasted within the utility's current planning horizon.

We note that network service is founded on the notion that the transmission provider has a duty to plan and construct the transmission system to meet the present and future needs of its native load and, by comparability, its third- party network customers. In return, the native load and third-party network customers must pay all of the system's fixed costs that are not covered by the proceeds of point-to-point service. This means that native load and third- party network customers bear ultimate responsibility for the costs of both the capacity that they use and any capacity that is not reserved by point-to-point customers. In this regard, native load and third-party network customers face a payment risk that point-to-point customers generally do not face. For these reasons, we do

not believe that it is appropriate to require native load and network customers to assume any additional cost responsibility for the capacity that is reserved for their future use.

In response to CCEM's concerns, we recognize that offering load-based network service and reservation-based point-to-point service in one tariff may have disadvantages in that it may result in less than optimal use of the system if a utility overestimates its load. However, by requiring that available capacity reserved for native load be posted on OASIS and be available to others except when actually needed to serve native load, we believe Order No. 888 substantially relieves the incentive to over-reserve for native load and goes a long way toward assuring full and efficient use of the system.

With regard to the concern raised by VA Com, the transmission provider has an ongoing duty to plan and construct its system in a prudent manner in order to meet all of its firm service obligations. We also reiterate that public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonably forecasted within the utility's current planning horizon. [141] There is a risk of under-or over-projecting the transmission needs of native load and network customers, and the native load and network customers' cost responsibilities reflect this additional risk. In response to VA Com's request, we note that nothing in our regulations prohibits a state commission from overseeing a utility's retail native load growth projections. Finally, concerns regarding the accuracy of load growth projections for native load and network customers may be raised when a transmission service agreement is filed with the Commission or in a separate section 206 proceeding.

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141 FERC Stats. & Regs. at 31,694; mimeo at 172.

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8. Consequences of Functional Unbundling

a. Distribution Function

In the Final Rule, the Commission concluded that the additional step of functionally unbundling the distribution function from the transmission function is not necessary at this time to ensure non-discriminatory open access transmission.[155]

Rehearing Requests

No requests for rehearing addressed this matter.

b. Retail Transmission Service

In the Final Rule, the Commission explained that although the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, it did not believe it was necessary.[156] The Commission further explained that the matter raises numerous difficult jurisdictional issues that are more appropriately considered when the Commission reviews unbundled retail transmission tariffs that may come before the Commission in the context of a state retail wheeling program.

Rehearing Requests

CCEM argues that all transmission must be unbundled, including currently bundled retail transmission service, because failure to do so is inconsistent with the

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155 FERC Stats. & Regs. at 31,699; mimeo at 186.

156 FERC Stats. & Regs. at 31,699-700; mimeo at 188.

Commission's assertion of jurisdiction over the rates, terms, and conditions of unbundled interstate transmission to retail customers and authority to address retail stranded costs through its jurisdiction over such costs. CCEM notes that the Commission found it necessary in Order No. 636 to unbundle the pipeline's direct retail sales to achieve comparability (CCEM cites FPC v. Conway Corp., 426 U.S. 271, 273 (1976) and Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215 (D.C. Cir. 1992) for the proposition that the Commission has jurisdiction over all interstate transmission).

NY Municipal Utilities and American Forest & Paper also argue that the Commission erred in not requiring the unbundling of the transmission component of retail sales. American Forest & Paper believes that such unbundling will facilitate competition by making the generation price transparent to all participants.

Commission Conclusion

We disagree with those entities that argue that the Commission erred in not requiring the unbundling of all transmission service, including the unbundling of transmission from retail service. As we explained in the Final Rule:

> when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves only the

provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation.[157]

Nor is our decision not to unbundle transmission from retail generation service inconsistent with our assertion of jurisdiction over unbundled interstate transmission to retail customers. As we explained in the Final Rule and described further above, we have exclusive jurisdiction under the FPA over "transmission in interstate commerce" by public utilities, which includes the unbundled interstate transmission component of a previously bundled retail transaction.[158] Our assertion of jurisdiction in such a situation arises only if the retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program.

c. Transmission Provider

1. Taking Service Under the Tariff

In the Final Rule, the Commission concluded that public utilities must take all transmission services for wholesale sales under new requirements contracts and new coordination contracts under the same tariff used by others (eligible customers).[159] For sales and purchases under existing bilateral

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157 FERC Stats. & Regs. at 31,781; mimeo at 430-31 (emphasis in original). As discussed in Section IV.I., infra, we believe this jurisdictional determination is supported by the statute and the case law, including the D.C. Circuit's recent decision in United Distribution Companies v. FERC, 88 F.3d 1105 (1996).

158 FERC Stats. & Regs. at 31,781; mimeo at 431.

159 FERC Stats. & Regs. at 31,700-01; mimeo at 191. See also discussion infra at Section IV.G. Section 1.11 (and Section 13.3).

economy energy coordination agreements, the Commission gave an extension until December 31, 1996 for public utilities to take transmission service under the same tariff used by others. The Commission also gave an extension of time to December 31, 1996 for certain existing power pooling and other multi-lateral coordination agreements to comply with this requirement.[160]

Rehearing Requests

This issue is discussed above in Section IV.C.1.b.

2. Accounting Treatment

In the Final Rule, the Commission directed utilities to account for all uses of the transmission system and to demonstrate that all customers (including the transmission provider's native load) bear the cost responsibility associated with their respective uses.[161]

Rehearing Requests

No requests for rehearing addressed this matter.

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G. Pro Forma Tariff

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[160] By notice issued September 27, 1996 in Docket Nos. RM95-8-000 and RM94- 7-001, the Commission revised the compliance dates. It required joint pool- wide section 206 compliance tariffs to be filed no later than December 31, 1996, and pool members to begin taking service under the tariffs 60 days after the section 206 filing. It also gave members of public utility holding companies an extension of time to take service under their system- wide tariff until no later than March 1, 1997.

[161] FERC Stats. & Regs. at 31,703; mimeo at 198.

3. Curtailment and Interruption Provisions[297]

a. Pro-Rata Curtailment Provisions

In the Final Rule, the Commission found that curtailment on a pro-rata basis is appropriate for curtailing transactions that substantially relieve a constraint.[298] The Commission explicitly allowed the transmission provider discretion to curtail the services, whether firm or non- firm, that substantially relieve the constraint.

The Commission also indicated that it would consider granting deference to an alternative curtailment method to avoid hydro spill if such a regional practice is generally accepted and adhered to across the region.

The Commission further found that under network and point-to-point service, the transmission provider may propose a rate treatment (penalty provision) to apply in the event a customer fails to curtail service as required under the Final Rule pro forma tariff and indicated that such proposals will be evaluated on a case-by-case basis on compliance.

Rehearing Requests

PA Com asserts that pro rata curtailment fails to hold native load harmless to the extent practical as required by the FPA. PA Com points out that on January 19, 1994, PJM initiated pro-rata load shedding, in part to preserve economic

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[297] In the Final Rule pro forma tariff, the Commission defines curtailment as: "A reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions." (pro forma tariff section 1.7). The pro forma tariff defines interruption as: "A reduction in non-firm service due to economic reasons pursuant to Section 14.7." (pro forma tariff section 1.15). The distinction between curtailment and interruption may have been blurred in Order No. 888 and this order attempts to clarify that distinction.

[298] FERC Stats. & Regs. at 31,749; mimeo at 335-36.

transactions, leaving customers in Pennsylvania without power during a record cold spell.

VA Com argues that pro rata curtailment may harm native load customers and section 206 complaints are after the fact and of little assistance to native load. VA Com argues that curtailment priority (in order of curtailment) should be: non-firm, contract firm, and then native load, and that utilities should have flexibility to curtail on a pro-rata basis within classes, subject to state curtailment policy.

Several entities argue that provision must be made for preference in curtailment priorities obtained through settlement, through payment of good and valuable consideration, or under existing transmission contracts.[209] Turlock argues that customers should be able to obtain a variation from the pro rata scheme if they can show that they have made either past or future investments to improve constrained facilities and that the quid pro quo for their investment is improved curtailment priority.

Allegheny asks the Commission to clarify that it did not intend to require public utilities to shed (through pro rata curtailment) native transmission load customers in order to preserve some portion of service to through system users of the gr*id*. According to Allegheny, the FPA mandates that service reliability to franchise customers must be maintained and through-system users are not similarly situated to native transmission load customers and should not be treated the same in an emergency because through system customers can protect themselves, but native transmission load customers cannot. Allegheny adds that failure to maintain system reliability would violate section 211 of the FPA.

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[209] E.g., Santa Clara, Redding, TANC.

CCEM asserts that hard and fast priority rules are needed to prevent inconsistent rules from developing for different utilities, pools, or control areas.

Commission Conclusion

Assertions that the pro-rata curtailment provision in the tariff may harm native load customers are misplaced. The Commission clarified in the Final Rule that it was not requiring a pro-rata curtailment of all transactions at the time of a constraint, but rather curtailment of those transactions, whether firm or non-firm, that effectively relieve the constraint.[300] The Commission also required that such curtailments be made on a non-discriminatory basis, including the transmission provider's own wholesale use of the system. The Commission further explained that the pro-rata curtailment provision was intended to apply to situations where multiple transactions could be curtailed to relieve a constraint. Of course, if curtailment of multiple transactions is necessary, non-firm service would be curtailed prior to firm service. However, the Commission established that, in emergencies, the transmission provider had the discretion to interrupt firm service under the tariff to ensure the reliability of its transmission system.

In terms of reliability, we believe that sufficient safeguards have been established to protect native load. In particular, the transmission provider is responsible for planning and maintaining sufficient transmission capacity to safely and reliably serve its native load. Order Nos. 888 and 889 permit the transmission provider to reserve, in its calculation of ATC, sufficient capacity to serve native load.

Allegations that a utility did not curtail on a non-discriminatory basis, but instead favored a certain class of customer or type of transaction should be filed in a section

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300 FERC Stats. & Regs. at 31,749; mimeo at 335.

206 complaint proceeding to be reviewed on a case- specific basis. While it is true that such complaints will be processed on an after-the-fact basis, it is only on a fact-specific basis that such complaints can be fully and adequately reviewed.

Additionally, tariff section 14.7 does in fact establish that for curtailment purposes, non-firm point-to-point transmission shall be subordinate to firm transmission service and non-firm service may also be interrupted for economic reasons. However, adopting curtailment schemes based solely on classes of service, as proposed by the VA Com, is inappropriate. Specifically, VA Com's proposal to curtail all non-firm transmission transactions prior to firm transactions could exacerbate an emergency situation. For example, a curtailment could be necessary due to a constraint affecting northbound transactions. However, curtailing all non-firm transactions, including southbound transactions (or counterflows), could worsen the situation. Accordingly, the Commission believes the approach established in the Final Rule of allowing non-discriminatory curtailments of the transaction(s) that effectively relieve(s) the constraint is appropriate.

In response to CCEM's concerns regarding the potential for inconsistent rules for different utilities, pools or control areas, the Commission explained in the Final Rule that any proposed deviations from the non-price terms and conditions of the pro forma tariff, such as regional practices, must be adequately supported by the utility proposing the change.

Finally, Order No. 888 did not abrogate existing contracts;[301] therefore, customers with unique curtailment priorities established by pre-existing contracts would not

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[301] We note that in Order No. 888 we partially modified existing economy energy coordination agreements. FERC Stats. & Regs. at 31,666; mimeo at 91.

have these priorities eliminated for the term of the existing contract.

b. Curtailment and Interruption Provisions for Non-firm Service

In the Final Rule, the Commission explained that it had clarified in the pro forma tariff that a network customer's economy purchases have a higher priority than non-firm point-to-point transmission service (citing AES Power, Inc.[302]).[303]

The Commission also revised the pro forma tariff to allow the transmission provider to curtail non-firm service for reliability reasons or to interrupt the service for economic reasons (i.e., in order to accommodate (1) a request for firm transmission service, (2) a request for non-firm service of greater duration, (3) a request for non-firm transmission service of equal duration with a higher price, or (4) transmission service for economy purchases by network customers from non-designated resources). The Commission further explained that a firm point-to-point customer's use of transmission service at secondary points of receipt and delivery will continue to have the lowest priority.

Rehearing Requests

For comparability, CCEM asserts that secondary receipt points should be made subordinate to other firm services,[304] but should have priority over non-firm point-to-point

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[302] 69 FERC 61,145 at 62,300 (1994) (proposed order), 74 FERC 61,220 1996)(final order).

[303] FERC Stats. & Regs. at 31,750; mimeo at 338-39.

[304] A firm point-to-point customer has a right to change its receipt points if capacity is available. These changed receipt points are known as secondary receipt points. The issue addressed here is the priority that is assigned to those secondary receipt points.

transactions. CCEM also argues that non-firm point-to-point service, once scheduled, should not be interrupted to accommodate non-firm service for a network service economy purchase.

VT DPS argues that firm flexible point-to-point service over secondary points of receipt and delivery should have a priority over non-firm point-to-point service (citing sections 14.2 and 14.7 of the pro forma tariff). It argues that this priority is necessary to reflect the fact that point-to-point customers pay for firm service and to be consistent with the treatment of network customers. VT DPS notes that in the natural gas industry the Commission has found that such priority is essential to reflect the fact that firm customers are paying for firm service (citing Order No. 636-B).

APPA asks the Commission to clarify the conditions under which the Commission will allow non-firm service to be interrupted by the transmission provider solely for economic reasons. APPA claims that this clarification is needed so as to prevent interruption of service on a discriminatory basis.

CCEM states that non-firm point-to-point transmission service does not provide the user with a specific capacity reservation, and therefore such service should bear no reservation or demand-like charges and the customer should pay a commodity-only charge only for when the service is being provided.[305] It contends, for example, that if a customer schedules one week of weekly non-firm transmission service and is interrupted on the second day of service, the customer should only pay for the service it used and should have no responsibility to take or to pay for service for the remainder of the week. Alternatively, it argues that if there are reservation charges and the non-firm customer pays for service on a "take-or pay basis" regardless of use, non-firm service should not be subject to being bumped once service is

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[305] See also Tallahassee.

scheduled and power is flowing. Moreover, if the non-firm point-to-point transmission customer does pay reservation charges on a "take-or-pay basis," the non-firm reserved capacity should be tradeable in a secondary market.

Commission Conclusion

We reject CCEM's proposal to prevent scheduled non-firm transmission service from being interrupted to accommodate economy purchases for network customers. Non-firm service is provided on an interruptible basis. To the extent CCEM wishes to obtain service that cannot be interrupted to accommodate other transactions, it has the option of requesting firm service in the form of either network or point-to-point transmission service.

APPA's concerns have already been addressed by the Commission. In the Final Rule, the Commission specifically listed the economic reasons that a transmission provider could interrupt non-firm point-to-point transmission to include:

accommodat[ing] (1) a request for firm transmission service, (2) a request for non-firm service of greater duration, (3) a request for non-firm transmission service of equal duration with a higher price, or (4) transmission service for economy purchases by network customers from non-designated resources. [[306]]

CCEM's arguments are misplaced in that they focus on the specific rate (including any potential credits for service interruption) that utilities may propose for non-firm point-to-point transmission service. Order No. 888 did not mandate any pricing methodology to be used for non-firm point-to-point transmission service. Rather, the Commission established the minimum non-price terms and conditions

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306 FERC Stats. & Regs. at 31,750; mimeo at 338.

necessary to ensure comparable service. As the Commission explained in the Final Rule, utilities are free to propose any rates for non- firm point-to-point transmission in a section 205 filing consistent with the Commission's Transmission Pricing Policy Statement.[107] However, the Commission will evaluate the appropriateness of such proposed rates against the non-price terms and conditions established in the pro forma tariff or other non-price terms and conditions proposed and fully supported by the utility.[108]

The Commission has previously addressed VT DPS' point.[109] Non-firm point-to-point customers pay for non-firm service as their service. Firm point-to-point customers, on the other hand, contract and reserve a specified amount of service over designated points of receipt and delivery. The Commission permitted these firm point-to-point customers to use secondary non-firm service (from points of receipt/delivery other than those designated in their service agreement) on an as-available basis at no additional charge. Because the firm point-to-point customers taking secondary non-firm are accorded this scheduling flexibility at no additional charge, they are properly accorded a lower priority than stand alone, non-firm transmission. In contrast, network customers are responsible for paying for a percentage of total system transmission costs in order to serve their designated network loads whether the energy is from designated network resources or from non-designated resources on an as-

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[107] FERC Stats. & Regs. at 31,769-70; mimeo at 395-99.

[108] We note that CCEM has pursued these arguments (raised on rehearing) in utility-specific rate cases and its objections will be addressed there.

[109] See FERC Stats. & Regs. at 31,750; mimeo at 338, and AES Power, Inc., 69 FERC 61,145 at 62,300 (1994) (proposed order), 74 FERC 61,220 (1996) (final order).

available basis.[110] Because the network customer pays a load-ratio share of total transmission costs, it receives a higher priority. Significantly, if any firm point-to-point customer wants to avail itself of the higher priority associated with economy energy purchases under the network tariff, it is free to do so by undertaking the cost responsibilities associated with network service.

Finally, in response to VT DPS, we note that we have chosen different approaches in the electric and natural gas areas. In this regard, we recognize that there is a trade-off between encouraging tradable capacity rights versus maximizing revenues that can be credited against the transmission provider's costs of providing transmission service. On the electric side, fully developed transmission capacity trading rights simply do not exist at this time, and so we have chosen to emphasize an approach that maximizes revenues to be credited to transmission customers. However, we will continue to evaluate our approach in the context of any future transmission rate proposal that is based on the concept of tradable capacity rights.

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7. Other Tariff Provisions

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f. Definition of Native Load Customers

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[110] This is comparable to the service a utility provides its native load.

The Commission defined the term "Native Load Customers" in section 1.19 of the pro forma tariff as:

The wholesale and retail power customers of the Transmission Provider on whose behalf the Transmission Provider, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate the Transmission Provider's system to meet the reliable electric needs of such customers.

Rehearing Requests

The pro forma tariff defines native load customers as "[t]he wholesale and retail power customers of the Transmission Provider. * * *" Cooperative Power argues that the definition of native load customers should recognize that joint planning is a sufficient criterion, and that construction and operation by the transmission provider should not be necessary for native load status to be conferred. It asserts that under joint planning, the loads of transmission-only customers are considered native, therefore the Commission should eliminate the word power from the definition.[402]

NRECA and TDU Systems state that traditional wholesale customers that have long been on the system, have assisted in paying for past expansions, and will likely continue to be captive to a provider's monopoly transmission service, should have "native load equivalent" rights if they take network or long-term firm service. If the transmission provider has planned and will plan in the future for a customer's full or partial needs, they argue that the customer

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[402] Dairyland filed a supplemental request for rehearing raising similar arguments. (Dairyland Supplement). We will accept this pleading as a motion for reconsideration, not as a request for rehearing, because it was not filed within the 30-day statutory period for rehearing requests. See 16 U.S.C. §8251(a).

should be treated as the equivalent of native load. They point out that section 1.19 of the tariff limits native load status only to wholesale power customers of the transmission provider.

VA Com argues that the definition of native load in section 1.19 of the tariff should include existing distribution cooperatives and others who currently provide service to end users.

Commission Conclusion

We reject Cooperative Power's suggestion to include transmission-only point- to-point customers in the definition of native load. We note that network customers are provided with rights comparable to native load customers because the transmission provider includes their network resources and loads in its long-term planning horizon. However, a point-to-point transmission service customer is not similarly situated to native load and Network Customers. The Network service formula rate requires the Network customer to pay a load-ratio share of the costs of the transmission provider's transmission system on an ongoing basis, while a point-to-point transmission service customer is only responsible for paying on a contract demand basis over the contract term. The network customer and the native load of the transmission provider pay all the residual costs of the transmission system and face greater risks of rate fluctuations due to facility additions and variations in load of both its and other customers. In contrast, the point-to-point transmission service customer may be more transitory in nature electing shorter terms of service and specific forms of service tailored for discrete services over specific time periods that do not necessarily enter into the transmission provider's planning horizon. To the extent a transmission customer desires similar rights and cost responsibilities to a native load customer, it can always elect to take network service.

We further note that, in granting a right of first refusal to existing customers, we afforded existing transmission only point-to-point customers a priority to continue to use the transmission provider's system.

VA Com's proposed change to the definition of native load was made in conjunction with its proposed change in the reservation priority (highest priority for "native load", followed by firm contract customers and lastly, non-firm customers). Because we are rejecting VA Com's proposed reservation priority (see Section IV.G.3.a. above), we will also reject its proposed conforming change to the definition of native load as proposed by VA Com.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3000

NORTHERN STATES POWER COMPANY,
A MINNESOTA CORPORATION;

NORTHERN STATES POWER COMPANY,
A WISCONSIN CORPORATION;

Petitioners,

MINNESOTA DEPARTMENT OF PUBLIC SERVICE;
DIARYLAND POWER CORPORATIVE,

Intervenor on Appeal,

v.

FEDERAL ENERGY REGULATORY COMMISSION:

Respondent,

Wisconsin Power Electric Company; Wisconsin Public Power, Incorporated; Southern Minnesota Municipal Power Agency; Missouri River Energy Services; Commonwealth Edison Company;Enron Power Marketing Incorporated,

Intervenor on Appeal,

East Texan Electric Cooperatives; Transmission Dependent Utility Systems; Transmission Access Policy Study Group; Electric Power Supply Association; Industrial Consumers; National Association of Regulatory Utility Commissioners; Various State Utility Commissions; Southern Company Services, Inc.,

Amici on Behalf of Respondent.

PETITION FOR REVIEW OF AN ORDER OF
FEDERAL ENERGY REGULATORY COMMISSION

The Petitions for rehearing en banc are denied. Judge Beam would grant the petition.

The petitions for rehearing by the panel are also denied.

Judge Richard S. Arnold and Judge Loken took no part in the consideration or decision of this case.

September 1, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX I

STATUTORY PROVISIONS

Relevant provisions of the Federal Power Act, 16 U.S.C. §§824, 824d, 824e, 824j, 824k, 824l and 825l:

§824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the

foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company",

"subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [15 U.S.C.A. § 79 et seq.].

§824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end

of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978 and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine--

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are--

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is un-

just, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, clas-

sification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in reve-

nues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. §79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

§824j. Wheeling authority

(a) Transmission service by any electric utility; notice, hearing and findings by Commission

Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of

such order at least 60 days prior to its filing of an application for such order.

(b) Reliability of electric service

No order may be issued under this section or section 824i of this title if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c) Replacement of electric energy

(1) Repealed. Pub.L. 102-486, Title VII, S 721(4)(A), Oct. 24, 1992, 106 Stat. 2915

(2) No order may be issued under subsection (a) or (b) of this section which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy--

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: Provided, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of[1] modification of an existing rate schedule: Provided, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(3), (4) Repealed. Pub.L. 102-486, Title VII, S 721(4)(C), Oct. 24, 1992, 106 Stat. 2915

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[1] So in original. Probably should be "or".

(d) Termination or modification of order; notice, hearing and findings of Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties

(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that--

(A) due to changed circumstances, the requirements applicable, under this section and section 824k of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall--

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to--

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) "Facilities" defined

As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

§824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub.L. 102-486, Title VII, S722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any

of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2) (A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Savings provisions

(1) No provision of section 824i, 824j, 824m of this title, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 824i, 824j, 824m of this title, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of Title 15, except that such term includes section 45 of Title 15 to the extent that such section relates to unfair methods of competition.

(f) Effective date of order; hearing; notice; review

(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 824i or of section 824j of this title requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. § 831n-4), hereinafter in this subsection referred to as the TVA Act [16 U.S.C.A. § 831 et seq.]

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 824i or 824j of this title until whichever of the following dates is applicable--

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 U.S.C.A. § 831n-4(a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 824i or section 824j of this title requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 U.S.C.A. § 831n-4(a)].

(g) Prohibition on orders inconsistent with retail marketing areas

No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C.A. §901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

(i) Laws applicable to Federal Columbia River Transmission System

(1) The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that--

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, section 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this chapter with respect to the procedures for the determination of terms and conditions for transmission service--

(A) when the Administrator of the Bonneville Power Administration either (i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or (ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River Transmission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall--

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 839e(i) of this title, except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's

recommended decision, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section; and

(B) if application is made to the Commission under section 824j of this title for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination and in accordance with Commission procedures, the Commission shall--

(i) in the event the Administrator has conducted a hearing as herein provided for (I) accord parties to the Administrator's hearing the opportunity to offer for the Commission record materials excluded by the Administrator from the hearing record, (II) accord such parties the opportunity to submit for the Commission record comments on appropriate terms and conditions, (III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and (IV) establish terms and conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 824j of this title and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 825l(b) of this title which designate the court in which review may be obtained, any party to a proceeding concerning transmission

service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific Northwest, as that region is defined by section 839a(14) of this title.

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 824j of this title, as a result of the Administrator's other statutory mandates, either to (A) provide transmission service to an applicant which the Commission would otherwise order, or (B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 824i of this title, section 824j of this title, this section, or section 824l of this title requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in the Pacific Northwest, as that region is defined in section 839a(14) of this title, as is needed to assure adequate and reliable service to loads in that region.

(j) Equitability within territory restricted electric systems

With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 824j of this title may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: Provided, however, That the foregoing provision shall not apply to

any area served at retail by an electric transmission system which was such a distributor on October 24, 1992 and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k) ERCOT utilities

(1) Rates

Any order under section 824j of this title requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a) of this section, on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

(2) Definitions

For purposes of this subsection--

(A) the term "ERCOT" means the Electric Reliability Council of Texas; and

(B) the term "ERCOT utility" means a transmitting utility which is a member of ERCOT.

§824*l*. Information requirements

(a) Requests for wholesale transmission services

Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1)

the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints

Not later than 1 year after the enactment of this section, the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

§ 825*l* Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which SUCh person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commis sion may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, af-

firming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX J

STATUTORY PROVISIONS

Relevant provisions of the Natural Gas Act, 15 U.S.C. 717, 717c and 717d:

§717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any

facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is--

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

§717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they

shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that

the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where

the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX K

PRO FORMA OPEN ACCESS TRANSMISSION TARIFF OF NORTHERN STATES POWER COMPANIES
Effective Date: July 1, 1997

I. COMMON SERVICE PROVISIONS

1. Definitions

* * *

1.7 Curtailment: A reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions.

* * *

II. POINT-TO-POINT TRANSMISSION SERVICES

* * *

13. Nature of Firm Point-to-Point Transmission Service

* * *

13.6 Curtailment of Firm Transmission Service: In the event that a Curtailment on the Transmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system, Curtailments will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-To-Point Transmis-

sion Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers. All Curtailments will be made on a non-discriminatory basis, however, Non-Firm Point-To-Point Transmission' Service shall be subordinate to Firm Transmission Service. When the Transmission Provider determines that an electrical emergency exists on its Transmission System and implements emergency procedures to Curtail Firm Transmission Service, the Transmission Customer shall make the required reductions upon request of the Transmission Provider.

However, the transmission Provider reserves the right to Curtail, in whole or in part, any Firm Transmission Service provided under the Tariff when, in the Transmission Provider's sole discretion, an emergency or other unforeseen condition impairs or degrades the reliability of its Transmission System. The Transmission Provider will notify all affected Transmission Customers in a timely manner of any scheduled Curtailments.

14. Nature of Non-Firm Point-to-Point Transmission

* * *

14.7 Curtailment or Interruption of Service: The Transmission Provider reserves the right to Curtail, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for reliability reasons when, an emergency or other unforeseen condition threatens to impair or degrade the reliability of its Transmission system. The Transmission Provider reserves the right to interrupt, in whole or in part, Non-Firm Point-To-Point

Transmission Service provided under the Tariff for economic reasons in order to accommodate (1) a request for Firm Transmission Service, (2) a request for Non-Firm Point-To-Point Transmission Service of greater duration, (3) a request for Non-Firm Point-To-Point Transmission Service of equal duration with a higher price, or (4) transmission service for Network Customers from non-designated resources. The Transmission Provider also will discontinue or reduce service to the Transmission Customer to the extent that deliveries for transmission are discontinued or reduced at the Point(s) of Receipt. Where required, Curtailments or interruptions will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint, however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. If multiple transactions require Curtailment or interruption, to the extent practicable and consistent with Good Utility Practice, Curtailments or interruptions will be made to transactions of the shortest term (e.g., hourly non-firm transactions will be Curtailed or Interrupted before daily non-firm transactions and daily non-firm transactions will be Curtailed or Interrupted before weekly non-firm transactions). Transmission service for Network Customers from resources other than designated Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service under the Tariff. Non-Firm Point-To-Point Transmission Service over secondary Point(s) of Receipt and Point(s) of Delivery

will have a lower priority than any Non-Firm Point-To-Point Transmission Service under the Tariff. The Transmission Provider will provide advance notice of Curtailment or Interruption where such notice can be provided consistent with Good Utility Practice.

* * *

28 Nature of Network Integration Transmission

* * *

28.2 Transmission Provider: The Transmission Provider will plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's Transmission System. The Transmission Provider, on behalf of its Native Load Customers, shall be required to designate resources and loads in the same manner as any Network Customer under Part III of this Tariff. This information must be consistent with the information used by the Transmission Provider to calculate available transmission capability. The Transmission Provider shall include the Network Customer's Network Load in its Transmission System planning and shall, consistent with Good Utility Practice, endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load Customers.

33 Load Shedding and Curtailments

* * *

33.4 Curtailments of Scheduled Deliveries: If a transmission constraint on the Transmission Provider's Transmission System cannot be relieved through the implementation of least-cost redispatch procedures and the Transmission Provider determines that it is necessary to Curtail scheduled deliveries, the Parties shall Curtail such schedules in accordance with the Network Operating Agreement.

APPENDIX L

FIRST REVISED OPEN ACCESS TRANSMISSION TARIFF OF NORTHERN STATES POWER COMPANIES

Issued: February 17, 1998

* * *

II. POINT-TO-POINT TRANSMISSION SERVICES

* * *

13. Nature of Firm Point-to-Point Transmission Service

* * *

13.6 Curtailment of Firm Transmission Service: In the event that a Curtailment on theTransmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system, Curtailments will be made on a non-discriminatory basis in accordance with the MAPP Line Loading Relief (LLR) Procedureto the transaction (s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-Transmission Service on a basis comparable to the curtailment of service to the Transmission

~~Provider's Native Load Customers~~. All Curtailments will be made on a non-discriminatory basis, however, Non-Firm Point-To-Point Transmission Service shall be subordinate to Firm Transmission Service. When the Transmission Provider determines that an electrical emergency exists on its Transmission System and implements LLR~~emergency~~ procedures to Curtail Firm Transmission Service, the Transmission Customer shall make the required reductions upon request of the Transmission Provider.

APPENDIX M

NSP

Northern States Power Company
414 Nicollet Mall
Minneapolis, Minnesota 55401-1993

Gary R. Johnson
Vice President & General Counsel
Telephone (612) 330-7623

November 19,1999

BY MESSENGER

David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Re: Northern States Power Company (Minnesota)
Northern States Power Company (Wisconsin)
Docket Nos. OA97-25-004 *et al.*,
Compliance Filing to Order on Remand

Dear Secretary Boergers:

Pursuant to the Commission's "Order on Remand" in the above-referenced proceeding, 89 FERC ¶61,178 (November 15, 1999), this is to advise you that Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (collectively, "NSP") hereby elect to withdraw their proposed amendment to the curtailment procedures in Sections 13.6 and 14.7 of NSP's Open Access Transmission Tariff ("OATT") filed on February 17, 1998 in Docket No. ER98-1890-000.

NSP submitted the proposed Tariff amendment to clarify that curtailments under its OATT would occur pursuant to regional, flow-based curtailment procedures used within the Mid-Continent Area Power Pool ("MAPP").[2] NSP has elected to withdraw the proposed amendment because actions taken by the Commission in other proceedings since the date of that filing have resolved the concerns that prompted the NSP requests for clarification and rehearing (and the resulting appeal): the Commission has ruled that transmission providers and regional security coordinators should take all feasible actions to avoid blackout of customers on any electric system.[3]

---

[2] The proposed NSP tariff changes were rejected by the Commission's April 30, 1998 order, and were thus never placed into effect. 83 FERC ¶61,098 (April 30, 1998). The settlement tariff pages attached to the March 23, 1999 Offer of Settlement separately pending in this matter do not include any changes to the pro forma Tariff language in Seciton 13.6 or 14.7.

[3] The Order on Remand correctly staes that the 8th Circuit Court opinion dealt only with the very narrow issue of retail electric service interruptions (the most extreme method of achieving a transmission curtailment), not the broader issue whether a transmission provider must engage in pro rata curtailment (by redispatch) of native and network uses of the transmission system; the latter issue was not disputed by NSP and thus was not before the Court.

Specifically, the Commission has taken many important actions since the NSP filing and the April 30, 1998 Commission order which have enhanced the reliability of the electric grid. These include:

(1) Allowing and then mandating that transmission providers use regional, flow-based curtailment procedures such as the Transmission Loading Relief ("TLR") procedures developed by the North American Reliability Council ("NERC") to implement curtailments under the Order No. 888 pro forma Tariff; and then clarifying that all alternative regional curtailment methods should be used prior to load shedding.[4]

(2) Accepting for filing the MAPP Line Loading Relief ("LLR") procedure.[5]

(3)Accepting for filing a variety of measures designed to facilitate use of redispatch to relieve transmission con-

---

[4] *North American Elec. Reliability Council*, Docket No. EL98-52-000, "Notice of Filing and Notice Regarding Implementation of NERC Transmission Loading Relief Procedures," (June 12, 1998); *North American Elec. Reliability Council*, 85 FERC ¶61,353 (1998), *reh'g denied*, 87 FERC ¶61,161 (1999); *North American Elec. Reliability Council*, 86 FERC ¶61,275 (1999); *North American Elec. Reliability Council*, 87 FERC ¶1,160 (1999); *North American Elec. Reliability Council*, 88 FERC ¶61,046 *order accepting compliance filing*, 89 FERC ¶61,031 (1999). The Commission required modifications to the TLR procedures to permit simultaneous implmentation of levels 4 and 5 to allow curtailments under TLR on a comparable basis.

[5] *Mid-Continent Area Power Pool*, 87 FERC ¶61,333 (1999); *see also NSP Operating Cos.*, Docket No. ER99-3465-000 (unpublished delegated letter order issued Aug. 3, 1999). The LLR methododology expressly includes both firm point-to-point and native/network load uses of MAPP transmission providers in the up-front calculation of the pro rata curtailments needed to effectively relieve a constrained regional transmission facility.

straints, including redispatch tatiffs filed by MAPP and NSP.[6]

In addition, the Commission has vigorously supported the formation of regional transmission organizations, in part, because they can be more effective than individual utilities in relieving transmission constraints. NSP notes in this regard the Commission's statement in the Order on Remand (at note 10) that "the distinction between third-party and native load service would not arise under a tariff administered by a regional transmission organization which, for example, manages congestion on a regional basis." NSP agrees with the Commission that the formation of regional organizations, which have the authority and geographic scope to identify and implement measures which reduce transmission constraints on a regional basis, offer the best means to ensure transmission reliability.

Consistent with this position, NSP has agreed to join the Midwest Independent System operator ("MISO"). NSP recently executed the signature pages to the MISO agreement and has committed to make all other necessary regulatory filings by March 1, 2000. In addition, it has sought to expand the geographic scope of the MISO by actively supporting integration of various MAPP transmission functions into MISO and by creating the opportunity for an Independent Transmission Company ("ITC") to form within MISO. MAPP and MISO recently entered into a Memorandum of Understanding addressing further integration and the MISO recently filed a proposal to allow for the formation of an ITC within the MISO. If the merger between NSP and New Century Energies, Inc. is consummated, Southwestern Public Service Company would also become a MISO member.

---

[6] *North American Elec. Reliability Council*, 87 FERC ¶61,160 (1999); *North American Elec. Reliability Council*, 88 FERC ¶61,009 (1999); *Mid-Continent Area Power Pool*, 87 FERC ¶61,190 (1999); *NSP Operating Cos.*, Docket Nos. ER99-1980-000 and ER99-2013-000 (unpublished delegated letter order issued June 24, 1999).

In light of these events, NSP withdraws the proposed amendments to the curtailment procedures of Section 13.6 and 14.7 of its OATT filed in Docket No. ER98-1890.

Sincerely,

Gary R. Johnson
Vice President and
General Counsel

cc: James J. Hoecker, Chairman
Commissioners:
Vicky A Bailey
Linda K. Breathitt
Curtis L. Hebert, Jr.
William L. Massey
John H. Conway, Acting Solicitor
All Parties of Record

MOTION FILED
UTIL 2 1999.

(3)

No. 99-916

IN THE

SUPREME COURT OF THE UNITED STATES

Enron Power Marketing, Inc., Petitioner,

v.

Northern States Power Co., Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL, AMERICAN IRON AND STEEL INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, TRANSMISSION ACCESS POLICY STUDY GROUP, AND TRANSMISSION DEPENDENT UTILITY SYSTEMS AS AMICI CURIAE IN SUPPORT OF ENRON POWER MARKETING INCORPORATED'S PETITION FOR CERTIORARI

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28K

IN THE

SUPREME COURT OF THE UNITED STATES

No. 99-916

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF
THE ELECTRICITY CONSUMERS RESOURCE
COUNCIL,
AMERICAN IRON AND STEEL INSTITUTE,
CHEMICAL MANUFACTURERS ASSOCIATION,
TRANSMISSION ACCESS POLICY STUDY GROUP,
AND
TRANSMISSION DEPENDENT UTILITY SYSTEMS
AS AMICI CURIAE IN SUPPORT OF
ENRON POWER MARKETING INCORPORATED'S
PETITION FOR CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Amici, The Electricity Consumers Resource Council ("ELCON"), The American Iron and Steel Institute ("AISI"), The Chemical Manufacturers Association ("CMA") (together, "Industrial Consumers"), The Transmission Access Policy Study Group ("TAPS"), and The

Transmission Dependent Utility Systems (TDU Systems) respectfully move for leave to file the attached Brief of Amici Curiae in Support of the Petition for Writ of Certiorari filed by Enron Power Marketing, Inc. ("Enron"). Enron has consented to the filing of the brief. This motion is necessary because Respondent has denied consent.

Industrial Consumers, TAPS, and TDU Systems each have a significant interest in this case. First, each of the amici participated in the lower court proceedings as amici curiae. Second, the decision rendered by the Court of Appeals for the Eighth Circuit in Northern States Power Co. v. FERC, 176 F.3d 1090 (8th Cir. 1999), adversely impacts the development of competitive wholesale electric power markets. Consumers and transmission-dependent utilities have a substantial interest in a vibrant and competitive electric power industry. Vertically integrated investor-owned utilities are already citing the Eighth Circuit's decision to ensure that FERC does not have authority to prevent discrimination in curtailment of interstate transmission by transmission-owning utilities. Alternative suppliers of electricity that are dependent on the transmission facilities of others will not have a fair opportunity to compete unless they can use the same quality of electric service as vertically-integrated utilities.

The issues presented by this case are of exceptional importance to amici and their members. The Eighth Circuit decision in NSP could threaten the development of a competitive electricity industry by denying wholesale, transmission dependent competitors of traditional utilities the ability to offer customers comparable firm transmission service--to the detriment of competitors and consumers. Amici Industrial Consumers and consumer-owned and transmission-dependent utilities represent sectors not otherwise represented.

Amici therefore respectfully seek leave of this Court to file the attached brief in support of Enron's petition for writ of certiorari.

Respectfully submitted,

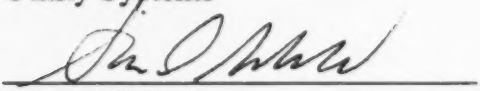
The Electricity Consumers Resource Council

The American Iron and Steel Institute

The Chemical Manufacturers Association

The Transmission Access Policy Study Group

The Transmission Dependent Utility Systems



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December 3, 1999

QUESTIONS PRESENTED

(1) Whether the decision of the Eighth Circuit in Northern States Power Co. v. FERC, 176 F.3d 1090 (1999) (the "NSP Decision"), conflicts with the decision of the United States Supreme Court in Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621 (1972), where the Supreme Court, interpreting analogous provisions of the Natural Gas Act ("NGA"), held that the Federal Power Commission's plan for curtailing natural gas pipeline transportation to all customers, adopted to prevent undue discrimination among transportation customers, did not exceed the Commission's NGA section 1(b) jurisdiction even though it applied to transportation of direct gas sales to retail customers.

(2) Whether the decision of the Eighth Circuit in NSP threatens orderly administration of the Federal Power Act ("FPA") by denying the Federal Energy Regulatory Commission ("FERC") jurisdiction to assure non-discrimination in curtailment of transmission in interstate commerce.

(3) Whether the decision of the Eighth Circuit in NSP threatens the development of a competitive electricity industry by denying transmission dependent competitors of traditional utilities the ability to obtain comparable firm electric service—to the detriment of competitors and consumers.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 99-916

ENRON POWER MARKETING, INC.,

Petitioner,

v.

NORTHERN STATES POWER CO.,

Respondent.

BRIEF OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL, AMERICAN IRON AND STEEL INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, TRANSMISSION ACCESS POLICY STUDY GROUP, AND TRANSMISSION DEPENDENT UTILITY SYSTEMS AS AMICI CURIAE IN SUPPORT OF ENRON POWER MARKETING INCORPORATED'S PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule of Procedure 37, Amici Curiae, The Electricity Consumers Resource Council ("ELCON"), The American Iron and Steel Institute ("AISI"), The Chemical Manufacturers Association ("CMA"), The Transmission Access Policy Study Group ("TAPS"), and The Transmission Dependent Utility Systems ("TDU Systems") support the Petition for Writ of Certiorari filed by Enron Power Marketing, Inc. ("Enron") in this case.*

---

* No other party other than counsel for Amici Curiae authored the brief, in whole or in part, or made monetary contributions to the brief.

OPINION BELOW

Northern States Power Co. v. FERC, 176 F.3d 1090 (8th Cir. 1999).

STATUTORY PROVISIONS

Federal Power Act ("FPA"), 16 U.S.C. §§ 824(b), 824d(b), 824d(e) (1994).

DESCRIPTION OF AMICI

The Electricity Consumers Resource Council ("ELCON") is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates.

The American Iron and Steel Institute ("AISI") is the principal trade association of the North American steel industry.

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals in the United States.

The Transmission Access Policy Study Group ("TAPS") is an informal association of municipal, cooperative and investor-owned utilities and other supporters in more than 24 states, promoting open and non-discriminatory transmission access. Many TAPS members are transmission-dependent.

The Transmission Dependent Utility Systems ("TDU Systems") are seven transmission-dependent generation and transmission ("G&T") cooperatives serving (through their

member distribution cooperatives) over 2.5 million metered accounts in seven states.

Amici participated as amici curiae in the proceedings below.

STATEMENT OF THE CASE

This case involves the question whether the U.S. Federal Energy Regulatory Commission ("FERC"), in order to prevent undue discrimination in transmission of electric power, has jurisdiction to prescribe transmission curtailment rules that affect interstate transmission that is associated with a transmission-owning utility's direct sales of electric energy to retail customers. In the NSP Decision, the Eighth Circuit ruled that FERC's insistence that Northern States Power Company ("NSP") conform to the nondiscriminatory, open-access transmission requirements mandated by a FERC rule—Order 888—intruded upon state jurisdiction over retail sales of power.

A. The Non-Discrimination Provisions of FERC Order 888

Order 888 was adopted following a comprehensive, multi-year rulemaking.[1] FERC found that transmission-owning public utilities provided to themselves and their affiliates transmission service superior to the service provided to other eligible customers, Order 888 at 31,635, in violation of the nondiscrimination provisions of the FPA. 16

[1] Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order 888, [Reg. Preambles Jan. 1991-June 1996] F.E.R.C. Stats. & Regs. ¶ 31,036 [hereinafter cited as Order 888], *clarified*, 76 F.E.R.C. ¶¶ 61,009, 61,347, *order on reh'g*, Order 888-A, III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order 888-B, F.E.R.C. ¶ 61,248 (1997), *appeal pending sub nom.* Transmission Access Policy Study Group v. FERC (D.C. Cir. No. 97-1715).

U.S.C. § 824d(b), 824d(e) (1994). To remedy this discrimination, FERC ordered all jurisdictional public utilities to adopt a pro forma open-access transmission tariff ("OATT") that included provisions to govern pro rata curtailment of firm transmission service. Order 888 at 31,636. FERC found that pro rata curtailment is a "key means" for ensuring non-discriminatory open access and is a fundamental term and condition of the OATT. Id. at 31,749. The comprehensive rulemaking that produced FERC Order 888 is currently the subject of a judicial review action pending in the United States Court of Appeals for the D.C. Circuit. Transmission Access Policy Study Group v. FERC, Complex Case No. 97-1715.

Order 888 allows a transmission owner, such as NSP, to withhold from the firm-service market transmission capacity that it currently uses or anticipates using to provide service to retail direct-sale customers, referred to as "native load." Order 888 at 31,694, 31,745. Thus a transmission-owning utility is not obligated under Order 888 to sacrifice transmission capacity needed for retail customers that it serves pursuant to state law. Instead, a utility is authorized under Order 888 to retain for its direct sales and offer only on an interruptible basis the capacity on its system that it uses or anticipates using for service to its native load. However, Order 888's rule restricting the curtailment of firm transmission service does not allow NSP or other transmission-owning utilities to offer customers firm service and then treat them as interruptible so that NSP can divert the capacity sold as firm to its direct-sale uses. Order 888 at 31,957.

B. FERC's NSP Orders

NSP applied to FERC for permission to use its transmission tariff to permit NSP to grant a priority to transmission for sales to its retail native load customers in

the event that curtailment of firm transmission service is required.

FERC denied NSP's proposal to curtail only firm point-to-point transmission customers and not network/native load customers when NSP exhausts all network/native load generation redispatch options. See Northern States Power Co., 83 F.E.R.C. ¶ 61,338 at 62,369 (1998). FERC found that this curtailment scheme would violate the comparability requirements of Order 888 and the fundamental OATT provision requiring pro rata curtailment of all firm transmission customers.

FERC denied a request for further clarification and rehearing, rejecting NSP's argument that the Commission was exceeding its jurisdiction. FERC emphasized that it was not regulating nonjurisdictional bundled direct sales, but avoiding preferential treatment by NSP of its native load customers in curtailment situations. Northern States Power Co., 84 F.E.R.C. ¶ 61,128 at 61,671 (1998).

C. Decision of the Eighth Circuit

In the context of reviewing FERC orders invalidating curtailment provisions in NSP's tariffs, the Eighth Circuit held that FERC exceeded its jurisdictional reach when it ruled that transmission providers cannot discriminate between curtailment of wholesale customers in interstate commerce and retail (intrastate "native load") customers. The Eighth Circuit held that FERC's "attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC." Northern States Power Co. v. FERC, 176 F.3d 1090, 1096 (8th Cir. 1999) (the "NSP Decision").

D. Subsequent Developments

On remand, FERC issued an order allowing NSP to curtail firm point-to-point transactions after all redispatch options have been exhausted without pro rata curtailments for network/native loads. Northern States Power Co., 89 FERC ¶ 61,178 (1999). In response to this order, NSP submitted a letter to FERC, Docket ER98-1898, on November 19, 1999 withdrawing its proposed OATT modifications. If and when the application becomes effective, the instant case will be mooted leaving in place the Eighth Circuit decision impairing FERC's jurisdiction. Under these circumstances, it would be appropriate for this Court to vacate the NSP Decision and remand to the Eighth Circuit with an instruction to dismiss the case.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted on two grounds: First, there is an apparent conflict with respect to the scope of FERC's authority to remediate discrimination between the Eighth Circuit's NSP Decision and a Supreme Court precedent arising under counterpart provisions of the Natural Gas Act--which this Court has found substantially identical to FPA provisions.

Second, this case presents a question of exceptional importance to fostering competition in the electric power industry. As consumers and transmission-dependent utilities, it is critical to Amici that independent power marketers (such as Enron) and other wholesale suppliers be able to compete and to offer customers the same continuous and reliable firm service as incumbent vertically-integrated providers. Amici are concerned that if the Eighth Circuit decision stands, the concept of the uniform quality of "firm" transmission service may be eviscerated.

The NSP Decision is inconsistent with, and does not address, the U.S. Supreme Court's ruling in Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621 (1972) ("LP&L"), which held that the Federal Power Commission ("FPC") has authority under the analogous Natural Gas Act to eliminate undue discrimination in the provision of interstate natural gas transportation and to administer curtailment even though retail customers may be affected. In conflict with LP&L, the NSP Decision erroneously concludes that FERC exceeds its jurisdiction when FERC seeks to remedy undue discrimination in the provision of interstate transmission services through adoption of transmission curtailment rules that affect transmission associated (or "bundled") with retail sales of power. Contrary to the Eighth Circuit's ruling, FERC has unqualified and exclusive federal jurisdiction over transmission of electric power in interstate commerce as it does over transportation of gas in interstate commerce.

The NSP Decision has adverse implications for FERC jurisdiction over restructuring:

(1) The goal of competitive power markets will remain illusory if other wholesale suppliers are not able to use the same reliable firm transmission service that a vertically-integrated utility can. Unless there is one uniform firmness of transmission service, these competitors will be unable to compete and provide customers with a viable alternative to traditional providers. If FERC has no jurisdiction to require proportionate curtailment of interstate transmission, its jurisdiction to regulate other aspects of interstate transmission service may be also called into question.

(2) Vertically-integrated utilities have already argued that the NSP Decision undermines a December 16, 1998 decision that FERC issued in connection with its implementation of a transmission loading relief ("TLR")

policy designed to assure grid reliability during periods of threatened overloads. FERC ordered that transmission-owning utilities cannot discriminate in curtailing transactions under the TLR policy between their wholesale customers and native load.

(3) The NSP Decision counters FERC efforts to administer the interconnected grid in the interest of reliability rather than parochial state interests. Under the rationale of the NSP Decision, the argument will be that FERC simply cannot take an action which in the view of any given state commission curtails service to that state's customers. Thus, the decision has adverse implications for other FERC initiatives, past and pending, that have imposed or would impose a duty on transmission providers to avoid discrimination.

I. The Eighth Circuit's Decision In NSP v. FERC Conflicts With Supreme Court Precedent

A. The NSP Decision Conflicts With LP&L, Where This Court Held That The Commission May Act to Avoid Discrimination in Interstate Gas Transportation Associated With Retail Sales

The FPA mandates that FERC eliminate undue discrimination in the provision of services subject to its jurisdiction. Curtailment priority is an integral part of jurisdictional transmission of electric energy in interstate commerce. Interstate transmission curtailment priorities are wholly within FERC's transmission jurisdiction and are entitled to preference under the Supremacy Clause even if curtailment may affect a transmission-owning utility's service to direct retail customers.

A Supreme Court decision arising under parallel provisions of the Natural Gas Act ("NGA") has adjudicated the principal legal question. LP&L, 406 U.S. at 621, involved the issue of whether FERC's predecessor, the FPC, had authority to effect orderly curtailment plans involving both direct sales and sales for resale.

In LP&L, this Court reversed the Fifth Circuit's determination that the provision of NGA section 1(b) withholding jurisdiction over direct sales barred the FPC from authorizing United Gas Pipe Line Company's transportation curtailment plan, which applied equally to sales-for-resale and direct-sale customers. In LP&L, this Court ruled that the FPC may exercise jurisdiction over curtailment of interstate transportation of gas where gas is being transported to a retail customer to avoid undue discrimination. The curtailment authority arises from the FPC's jurisdiction over interstate transportation. This Court concluded that the FPC is not precluded from exercising jurisdiction by the NGA clause withholding federal jurisdiction to set the rates for direct sales. See 406 U.S. at 641.

The only difference between LP&L and NSP is that FERC promulgated the firm-service transmission curtailment rule of FERC Order 888 at issue in the NSP Decision pursuant to FPA section 201(b) jurisdiction over interstate transmission of electric energy and FPA section 206, which imposes on FERC the duty to eliminate undue discrimination in interstate transmission. FPC adopted the natural gas pipeline curtailment plan at issue in LP&L under NGA section 1(b) jurisdiction over interstate transportation of natural gas and NGA sections 4 and 5, which impose on FERC the duty to eliminate undue discrimination in interstate transportation. This Court observed in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981), that "relevant provisions" of the FPA and the NGA are "in all material respects substantially identical." This Court has an

"established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." Id.; FPC v. Conway Corp., 426 U.S. 271, 281 (1976). See also Kentucky Utilities Co. v. FERC, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985).

LP&L holds that the Commission may exercise jurisdiction over interstate transportation or transmission to avoid discrimination in curtailment regardless of whether the interstate transportation or transmission is associated with direct retail sales. In LP&L, this Court recognized that Commission administration of a uniform system of curtailment was essential. Attempts by individual states to craft national policy would likely result in constitutionally prohibited undue interference with interstate commerce and a conflicting patchwork of individual state initiatives. See 406 U.S. at 632-33.

B. The Panel's Decision on Jurisdiction Also Conflicts with the Decision of the D.C. Circuit in Mississippi River Transmission Corp. v. FERC

The NSP Decision also is inconsistent with Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215 (D.C. Cir. 1992) ("MRT"), where the D.C. Circuit ruled: "FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute." Id. at 1217 (citing FPC v. East Ohio Gas Co., 338 U.S. 464, 468 (1950)).

MRT held that the clause in NGA section 1(b) confining FERC's rate setting authority to direct sales did not bar the Commission from exercising its statutory mandate to regulate interstate transmission when the transportation is bundled with a direct sale of natural gas. Id.

at 1218. The D.C. Circuit observed that state regulation of the conditions of interstate transportation of gas bundled for direct sale would risk parochial administration of gas transportation—an intolerable result:

> States cannot as effectively regulate the interstate transportation of gas bundled for direct sale to customers for the simple reason that the primary concern of state regulators is the interests of their state's citizens, who doubtless would prefer to pay less for transportation than those outside the state.

Id. If the Eighth Circuit's NSP Decision remains in place, the risk of parochial administration of the interstate grid is very real.

II. FERC's Plenary Federal Power Act Jurisdiction Over The Interstate Transmission Grid Is Threatened By The Eighth Circuit's Ruling Excluding Transmission Bundled With Direct Sales From The Anti-Discrimination Requirement Of Order 888

This Court should grant certiorari because the NSP Decision casts a legal cloud over FERC's efforts to regulate the interstate transmission grid and thereby redress discrimination in interstate transmission of power. Contrary to the Eighth Circuit, neither Minnesota nor Wisconsin (or any other of the several states in which NSP operates) can allocate the finite capacity of NSP's FERC-jurisdictional transmission system, where such allocation conflicts with the FERC's orders and discriminatorily favors in-state companies and users.

The unabashed pronouncement of the NSP Decision is to permit "preferential treatment to native customers...." 176 F.3d at 1094 n.5. Contrary to the NSP Decision, the impermissible consequence of empowering the states to

grant retail customers such superior use rights is to accord wholesale service priority inferior to bundled retail transmission service, contrary to FERC's determination. In the NSP orders FERC exercised its jurisdictional mandate to remedy and protect against undue discrimination. The requirement that states respect FERC-filed wholesale terms is a matter of enforcing the Supremacy Clause. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963-967 (1986); Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 370 (1989). In Order 888 (at 31,966) FERC correctly observed that:

> When Congress enacted the F[ederal] P[ower] A[ct], it gave the Commission exclusive jurisdiction over the rates, terms and conditions of transmission in interstate commerce by public utilities. The Supremacy Clause of the Constitution provides that federal laws enacted pursuant to the powers delegated to the federal government by the United States Constitution are the supreme law of the land.

A. The NSP Decision Threatens Competition By Thwarting Competing Wholesale Providers Who Must Be Able To Obtain Transmission Service As Reliable As That Of Traditional Incumbents

As consumers and transmission-dependent utilities, Amici have a strong interest in fostering the viability of alternative electricity providers as competitors to traditional incumbent utility providers. The NSP Decision strikes at the heart of the ability of Enron and other wholesale power suppliers, such as transmission-dependent utilities, to obtain firm electric service that is comparable in its reliability to that offered by incumbent, vertically-integrated utilities.

Under the NSP Decision, each state can set its own rules for transmission of bundled retail sales within that

state, without regard to what other states do and without regard to FERC's rules, while FERC is limited to setting rules for wholesale and "unbundled" retail uses. No regulatory body would have authority to ensure a coherent scheme for the use and allocation, among all users, of what is necessarily the single transmission network.

As we move toward retail competition on a state-by-state basis, it is essential that FERC be authorized to establish a single scheme for use of the grid that does not relegate use of the grid for wholesale sales or retail choice programs to second-class citizen status. Consumers will not switch to alternative suppliers if they cannot rely on the contract to receive power. The absence of a clear, unified set of rules also would enable one state to cripple customer choice programs in a neighboring state, by according in-state bundled sales a higher priority than unbundled deliveries to its neighbors.

FERC has ordered that transmission-owning utilities may not favor transmission to their own native load (retail) customers at the expense of other firm transmission customers who are competitors. The NSP Decision strips FERC of jurisdiction to prohibit discrimination and thereby deprives alternative suppliers of the ability to offer comparable firm electric service. It is critical that alternative suppliers of power that are dependent on the transmission facilities of others have a fair opportunity to compete, including the ability to offer electric service as reliable as that of their vertically-integrated competitors.

B. FERC's Transmission Loading Relief Procedures

The North American Electric Reliability Council ("NERC") is a not-for-profit corporation formed to promote the reliability and adequacy of bulk electric supply by the electric systems of North America. NERC responded to

numerous instances of transmission line overloads in the eastern United States in 1998 that were due to so-called "loop flows," or parallel flows of power, by developing transmission curtailment procedures called transmission loading relief procedures ("TLR"). FERC has reviewed and approved these procedures subject to certain conditions in an Order on Petition for Declaratory Order, In re North American Electric Reliability Council, 85 F.E.R.C. ¶ 61,353 (1998). One of the conditions that FERC imposed was that curtailment of parallel flows should not depend on whether they are associated with a "native load transaction, network service, or an interchange transaction."[2] In so holding, FERC expressly cited its decision in Northern States Power Co., 83 F.E.R.C. ¶ 61,338 (1998), where FERC had "rejected the argument that firm transmission customers have a lower curtailment priority than native load."

Even before the ink had dried on the NSP Decision, a utility, Virginia Electric and Power Company, filed a request for stay of FERC's May 12, 1999 order on TLR (Docket EL98-52/ER99-1986, dated June 11, 1999) asserting that the "Commission cannot require that curtailments be implemented proportionately if the curtailment would result in the shedding of bundled retail load without violating the Court of Appeals' order" in NSP.[3] A similar protest was filed on June 11, 1999, by Southern Company (Docket EL98-52), noting that in light of the Eighth Circuit's NSP Decision "the Commission should not attempt to regulate curtailment of bundled retail service."[4]

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[2] "Interchange transactions" are defined as scheduled sales for resales in interstate commerce where the energy is transmitted from one control area to another.

[3] See Exhibit A at 2 to Industrial Consumers Amicus Filing Eighth Circuit.

[4] Id., Exhibit B at 7.

Amici are concerned that if the NSP Decision stands, transmission-owning utilities who seek to give preference to native load in administering curtailments will seek to reopen FERC's TLR Orders, arguing that under the NSP Decision, FERC exceeds its jurisdiction when it imposes curtailment on native load inconsistent with state law priorities.

C. FERC Actions To Avoid Discrimination In Interstate Transmission Of Power Must Not Be Impeded By Parochial State Interests

In the context of striking protectionist state regulation as violative of the Interstate Commerce Clause,[5] this Court has expressed its disapproval of a state order that "is designed to gain an economic advantage for the citizens of [its state] at the expense of [a utility's] customers in neighboring states." See New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982) (holding that a state public utility commission's order requiring privately-owned and federally-licensed public utility to sell within state hydroelectric energy it had been exporting violated the Commerce Clause.) The states of Minnesota and Wisconsin cannot afford their residents a preferred right of access over out-of-state users to NSP's transmission system because such protectionist regulation is off-limits to the states. Yet the NSP Decision finds that because states have authority over retail sales of power, FERC's authority to remedy discrimination must be applied in a manner that does "not encroach upon the authority of the regulatory commissions of the states." Northern States Power, 176 F.3d at 1096.

FERC has recently proposed to establish Regional Transmission Organizations ("RTOs"), which has "as its objective for all transmission-owning entities in the Nation,

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[5] U.S. Const., art. I, § 8, cl. 3.

including non-public utility entities, to place their transmission facilities under the control of appropriate regional transmission institutions in a timely manner." *RTO* Proposed Rule, 64 Fed. Reg. 31,389, 31,391 (1999). FERC bases this rulemaking on the need to avoid discrimination in power markets that has manifested itself in several ways, including delays in responding to requests for transmission service from competitors and questions over the accuracy of postings of available transmission capacity. See id. at 31,397 - 31,413.

Large multi-state RTOs have as a principal responsibility to implement curtailment in a manner that best protects the reliability of the grid, overriding a given state's parochial interest that its load not be curtailed or that its incumbent suppliers retain in perpetuity their native load. The NSP Decision calls into question whether an independent system operator or RTO can direct the incumbent transmission-owning utility to transmit another utility's power if it means shedding native load.

Actions that are necessary to avoid discrimination must be recognized as binding on the states under the Supremacy Clause and as a legitimate exercise of FERC's plenary authority over interstate transmission and its duty to remedy discrimination.

Consistent with the FPA and the Supremacy Clause, FERC must be the ultimate arbiter of the reliability of the transmission grid and any uses made of that grid to effect the delivery of electric energy. Amici believe that it is essential to reliability that FERC, and not fifty states each expressing parochial interests, determine policies and procedures for administration of the electric power grid.

III. The Eighth Circuit's Decision in NSP is Clearly Erroneous

A. The Eighth Circuit Mistakenly Found An Irreconcilable Conflict Between Compliance With Order 888's Firm-Service Curtailment Rule And NSP's Responsibilities Under State Law

The firm-service curtailment rule was adopted by FERC to eliminate discrimination in interstate transmission.

The Eighth Circuit mistakenly found that NSP was wedged between a "rock and a hard place" because Order 888 required NSP to breach state laws that require utilities to offer uninterrupted service to native load. See Northern States Power, 176 F.3d at 1095. This was a serious factual error. In fact, Order 888 provides a transmission provider broad latitude to withhold its transmission capacity from the market if the capacity is needed to provide service to its existing or forecasted native load and network service.

A utility calculates the amount of available transmission capacity, or "ATC," that it will post on an electronic communications system as available for service pursuant to the terms and conditions of its nondiscriminatory OATT. Under Order 888, a transmission owner such as NSP is permitted "to reserve existing transmission capacity to serve the needs (current and reasonably forecasted) of its existing native load (retail customers)." Order 888-A at 30,198; see also Order 888 at 31,694, 31,747 ("transmission provider may reserve in its calculation of ATC transmission capacity necessary to accommodate native load growth reasonably forecasted"). Only ATC that is sold by NSP on a firm basis (i.e., not interruptible for economic reasons) benefits from the curtailment priority scheme that requires all firm reservations to be treated equally, including direct-sale service to native load. In other words, NSP and other

transmission-owning utilities may withhold from ATC that is offered for firm reservation all of the existing and future capacity on its transmission system that they need to provide uninterrupted service to existing and forecasted direct-sale native-load customers. See Order 888-A at 30,322.

The Eighth Circuit failed to comprehend the firm-service curtailment rule of Order 888, which in fact allows utilities to assure service to direct-sales native-load customers. The Commission had ruled:

> In terms of reliability, we believe that sufficient safeguards have been established to protect native load. In particular, the transmission provider is responsible for planning and maintaining sufficient transmission capacity to safely and reliably serve its native load. Orders 888 and 889 permit the transmission provider to reserve, in its calculation of ATC, sufficient capacity to serve native load.

Order 888-A, at 30,278. The Eighth Circuit's finding of an irreconcilable conflict between NSP's state law obligations to retail customers and its duties under FERC Order 888 was a fatal factual error.

B. The Eighth Circuit Erred In Concluding That Wholesale Customers Have Greater Access to Alternative Power Sources

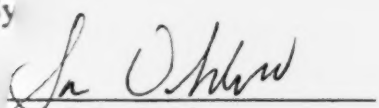
The Eighth Circuit was also factually incorrect when it concluded, with no record citations and no record support, that wholesale customers always have access to alternative power sources as opposed to vertically integrated transmission-owning utilities. To the contrary, transmission-owning utilities typically have generation that can be called upon if particular transmission paths are curtailed, while wholesale transmission-dependent customers often do not. Similarly, transmission-owning utilities have superior transmission interconnections vis-à-vis their wholesale customers and non-vertically integrated competitors. There is no reason to believe that the retail native load customer of a competitive (non-vertically integrated) power supplier has any more (or less) access to alternative supply than that of the similarly situated customer of the host utility.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to grant Enron's petition for certiorari. Alternatively, if the case becomes moot through NSP's withdrawal of its proposal, this Court should vacate the Eighth Circuit's NSP Decision and remand it to that court with instructions to dismiss the case as moot.

Respectfully submitted,

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December 2, 1999

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No. 99-916

IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S MEMORANDUM SUGGESTING MOOTNESS AND MOTION TO VACATE

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RULE 29.6 STATEMENT

Enron Corp. incorporates by reference the Rule 29.6 Statement provided in its Petition for Writ of Certiorari filed on November 30, 1999.

IN THE

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PETITIONER'S MEMORANDUM SUGGESTING MOOTNESS AND MOTION TO VACATE

Petitioner Enron Power Marketing, Inc. (Enron) hereby informs the Court that this matter has become moot and respectfully moves the Court for an Order vacating the judgment of the United States Court of Appeals for the Eighth Circuit and remanding to that court with instructions to dismiss the case as moot. *See United States v. Munsingwear Corp.*, 340 U.S. 36 (1950).

Enron filed a Petition for Writ of Certiorari on November 30, 1999, urging the Court to review the decision of the Eighth Circuit in this case. The petition explained that the decision presents important questions concerning the jurisdiction of the Federal Energy Regulatory Commission (FERC) to regulate interstate transmission of electricity. The petition also noted that the decision conflicts in significant respects with decisions of both this Court and the D.C. Circuit.

The petition also stated that respondents Northern States Power Companies (together, NSP) had taken steps to withdraw the tariff filing that gave rise to the present controversy. The petition said that when this withdrawal became effective, this case would be moot, and it said that in such event vacatur of the Eighth Circuit's decision would be appropriate. Pet. for Writ of Cert. at 12-13, 25. By order of December 20, 1999, FERC accepted NSP's unopposed withdrawal of its tariff filing. See Attachment A to this Motion. As a result of this withdrawal, a live controversy ceased to exist with respect to NSP's tariff, and the present case became moot.

The issues raised in Enron's petition, however, warranted this Court's review. NSP initially filed its amendments to its Open Access Tranmission Tariff (OATT) to permit it to favor its retail customers over its wholesale customers in curtailments of transmission. FERC issued an order rejecting NSP's amendments as unduly discriminatory, and NSP petitioned the Eighth Circuit for review, seeking to force FERC to permit its amendments. The Eighth Circuit held that FERC did not have jurisdiction to require nondiscriminatory curtailment of all interstate transmission of electricity and ordered FERC to amend its order "so as not to encroach upon the authority of the regulatory commissions of the states [over NSP's retail transmissions]." *See* Pet. App. 11a. On remand, as di-

rected by the Eighth Circuit, FERC issued an order permitting NSP's amendments, but NSP then took steps to withdraw its proposed curtailment amendments to its OATT. NSP thus erased the specific dispute that led to Enron's petition to this Court, leaving the Eighth Circuit's decision standing.

The Eighth Circuit's decision, holding that FERC lacks jurisdiction over an important part of interstate transmission of electricity, will remain damaging unless it is vacated. Enron, which depends on nondiscriminatory access to the transmission systems of other utilities, would be exposed to assertions of res judicata and collateral estoppel in any future challenge to a renewed discriminatory filing by NSP (which is in no way precluded by the events that have occurred and could not be blocked by FERC, which has been held to lack jurisdiction). Moreover, the decision below would remain the law of the Eighth Circuit, in conflict with the decisions of this and other Courts and in conflict as well with a sound understanding of the role of federal authority in preventing discriminatory practices in the interstate transmission of electricity and promoting competition in the sale of electricity.

In accordance with its normal practice, this Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot. "The established practice of the Court in dealing with a civil case . . . which has become moot while on its way [to the Supreme Court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994).

Enron did not in any way cause or contribute to the mootness of this matter. As the Court has noted, the *Munsingwear* rule exists to protect a litigant from the adverse effects of a judgment where it did not have the ability to obtain review because the case became moot through no fault of its own. *See Munsingwear*, 340 U.S. at 40. Vacatur is therefore appropriate under *Munsingwear* when mootness occurred through happenstance, the unilateral actions of the party who prevailed in the lower court, or any circumstances beyond the control of the party seeking vacatur. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 23-25. NSP's withdrawal of its tariff filing was a unilateral action of the party that prevailed below, and it was entirely beyond the control of Enron. Vacatur is therefore appropriate.[1]

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[1] Enron's right to move for vacatur is unaffected by its status as an intervenor below or by FERC's approval of the withdrawal of the amendments. *See Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1402-03 (11th Cir. 1998) (finding vacatur appropriate on intervenor's motion where intervenor did nothing to cause mootness, which was caused by settlement of other parties, who could not have successfully moved for vacatur on their own); *see also Sackman v. Liggett Group, Inc.*, No. Civ. 93-4166, 1999 WL 627389 at *1-2 (E.D.N.Y. May 21, 1999).

Petitioner therefore respectfully moves the Court for an Order vacating the judgment of the Eighth Circuit and remanding to that court with instructions to dismiss as moot.

Respectfully submitted,

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December 22, 1999

APPENDIX

ATTACHMENT A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

Docket Nos. OA97-25-004
OA97-606-004
ER98-1890-005
ER98-2060-005
EL98-40-004

NORTHERN STATES POWER COMPANY
(Minnesota)

NORTHERN STATES POWER COMPANY
(Wisconsin)

ORDER ACCEPTING WITHDRAWAL OF PROPOSAL

(Issued December 20, 1999)

Nothern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (collectively *NSP*) filed a letter with the Commission advising that NSP, in response to the Commission's November 15,

1999 Order on Remand in this proceeding,[1] elected to withdraw its proposed amendment to the curtailment procedures in NSP's open access transmission tariff filed in Docket No. ER98-1890-000.[2] No comments were filed to NSP's withdrawal of its curtailment proposal. We hereby accept NSP's withdrawal of its curtailment proposal.

By the Commission.

(SEAL)

/s/ David P. Boergers
DAVID P. BOERGERS
Secretary

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[1] *Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin)*, 89 FERC ¶ 61,178 (1999) (Order on Remand).

[2] The Commission previously rejected NSP's proposed tariff sheets containing NSP's revised curtailment procedures. *Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin)*, 83 FERC ¶ 61,098, *clarified*, 83 FERC ¶ 61,338, *reh'g, clarification and stay denied*, 84 FERC ¶ 61,128 (1998). The United States Court of Appeals for the Eighth Circuit, in *Northern States Power Co., et al. v. FERC*, 176 F.3d 1090 (1999), *reh'g denied* (order dated Sept. 1, 1999), remanded this matter to the Commission.

Supreme Court, U.S.
FILED
DEC 30 1999
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(5)

No. 99-916

IN THE

Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION TO VACATE

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QUESTIONS PRESENTED

(1) Whether the Petition should be dismissed because Petitioner did not seek FERC rehearing of the Curtailment Orders and did not invoke the mandatory review procedures as required by Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825.

(2) Whether the "narrowly circumscribed factual circumstance" of the Eighth Circuit's decision constitutes an important federal question that warrants Supreme Court review.

(3) Whether the Petition should be dismissed because Petitioner is extrapolating narrow issues of Curtailment Order interpretation into an impermissible collateral attack on Order No. 888.

RULE 29.6 LISTING

Northern States Power Company (Minnesota) has no parent company and one non-wholly owned subsidiary:

Cogeneration Corporation of America, a partially-owned subsidiary of NRG Energy, Inc., which is in turn a wholly-owned subsidiary of Northern States Power Company (Minnesota).

Northern States Power Company (Wisconsin's) parent company is Northern States Power Company (Minnesota) and has no non-wholly owned subsidiaries.

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No. 99-916

IN THE

Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION TO VACATE

INTRODUCTION

The Petition by Enron Power Marketing, Inc. ("Enron") for review of the Eighth Circuit Court of Appeals' decision in *Northern States Power Company v. FERC*, 176 F.3d 1090 (8th Cir. 1999) (Petitioner's Appendix ("App.") 1a - 11a) (hereinafter "*NSP*") should be denied. The Eighth Circuit opinion reversed and remanded three administrative Orders (collectively the "Curtailment Orders") (App. 12a-35a, 36a-41a, 42a-43a) [1] that

[1] The Curtailment Orders issued by the Federal Energy Regulatory Commission ("FERC") can be found at: 83 FERC ¶ 61,098 (April 30, 1998); order on request for clarification, 83 FERC ¶ 61,338 (June 29,

required Respondents (hereinafter "NSP") to *interrupt* electric service to its captive retail customers. In response to NSP's request for clarification, the Curtailment Orders subjected "bundled"[2] retail service to pro rata transmission interruption (*i.e.* load shedding) when NSP *curtails* service to "unbundled" point-to-point transmission customers who have alternate supply options.[3] The Eighth Circuit held that FERC lacks authority to compel retail load shedding in such circumstances.

Supreme Court review is unwarranted because Enron now seeks to resolve issues that do not arise out of the decision below. Moreover, the Eighth Circuit properly applied the relevant administrative and jurisdictional precedents, including FERC's Order No. 888,[4] to what FERC itself

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1998); and order denying requests for clarification, reh'g, and stay, 84 FERC ¶ 61,128 (July 31, 1998).

[2] Bundled service is the provision of electricity to customers who obtain their full energy requirements from their local utility. The power is sold, transmitted and delivered at retail to captive customers at regulated rates that are designed to recover the cost of service plus a prescribed return on investment.

[3] Firm point-to-point wholesale customers reserve interstate transmission capacity to transport electricity. These customers, primarily other utilities and power marketers like Enron, resell that energy for a profit. Generally such unbundled customers have alternate procurement options (production from their own power plants for example) if electricity cannot be delivered over a specific transmission line. *NSP*, 176 F.3d at 1093.

[4] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,036 (1996), clarified, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996) order on reh'g, Order No. 888-A, 62 Fed. Reg. 12, 274 (Mar. 14, 1997), III FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), appeals pending sub nom. Transmission Access Policy Study Group v. FERC (D.C. Cir. No. 97-1715)(Oral Argument, Nov. 3, 1999).

described on remand as the "narrowly circumscribed factual circumstance" (App. p. 47a) of this case. Further, since the Curtailment Orders were issued, FERC refined the procedures for alleviating transmission capacity congestion which necessitates curtailments. These new "rules of the road" materially reduce the likelihood that the "narrowly circumscribed factual circumstance" addressed by the Eighth Circuit could occur. Accordingly, on remand NSP withdrew the proposed tariff amendment that precipitated the Curtailment Orders and the initial dispute.

STATEMENT OF THE CASE

The facts and regulatory structure out of which the underlying dispute arose are complex. But once the complete procedural history is understood, the reasons for denying Enron's Petition and the accompanying *Motion for Leave to File Brief and Brief of the Electricity Consumers Resource Counsel, et al as Amici Curiae* (hereinafter the " Amici") become clear.[5] The starting point is the Eighth Circuit's description of the case, which NSP adopts.

A. The Open Transmission Access Initiative.

NSP sells point-to-point transmission service to wholesale customers pursuant to a FERC-approved Open Access Transmission Tariff (the "Transmission Tariff"). The Transmission Tariff is on file at FERC pursuant to the FPA and Order No. 888. FERC regulates wholesale utility services such as point-to-point transmissions.[6] In this capacity FERC

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[5] On December 23, 1999, NSP received Enron's Memorandum Suggesting Mootness and Motion to Vacate. That Motion adds nothing new for the Court's consideration. NSP will not waste the Court's time with a separate, duplicative response as the analysis in this Brief already disposes of the issues raised in Enron's Motion. In short, Enron's Motion merely continues the impermissible collateral attack on Order No. 888.

[6] By contrast, as contemplated by the FPA, FERC Order No. 888, and years of judicial precedent, NSP's "bundled" retail service is conducted pursuant to retail NSP tarriffs on file with various State and Public utilities

promotes open access to the interstate transmission system in order to foster power supply competition. NSP strongly supports these pro-competitive policies. Like Enron, NSP sells wholesale power. This business benefits from "open access." The nondiscriminatory availability of transmission capacity enables NSP to market power at wholesale over a broad regional marketplace. The *quid pro quo* for access to the transmission grids of neighboring utilities is that NSP must offer comparable access to its proprietary transmission system.

Order No. 888 was promulgated to implement this "open access" policy. All owners of wholesale transmission facilities are required to provide service pursuant to Transmission Tariffs that contain terms identical to or superior to Order No. 888's published "pro forma" tariff. The same Transmission Tariff must be applicable to all wholesale electricity shipments. Simply put, a transmission system owner is prohibited from favoring its own wholesale transactions over the comparable wholesale transactions of a competitor. FERC exercises jurisdiction over all such jurisdictional wholesale transactions, and Order No. 888 establishes the regulatory framework under which the wholesale power marketing business is conducted. Essentially the nation's investor-owned electric transmission systems are treated like common carriers of wholesale power supply shipments. Enron and NSP's merchant function compete in this marketplace.

Contrary to Enron's mischaracterization, the Eighth Circuit's narrow decision does no violence to open transmission access. Order No. 888 clearly prevents NSP from discriminating against Enron's FERC-jurisdictional transactions in favor of NSP's own jurisdictional transactions. But Enron's Petition goes far beyond seeking comparable treatment; Enron wants a dramatic expansion of FERC jurisdiction beyond the bounds of Order No. 888.

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commissions. State law governs the "local distribution" of electricity, 16 U.S.C. § 824 (b)(1); *see NSP*, 176 F.3d at 1095.

In promulgating Order No. 888, FERC exercised its authority to ban discrimination in the wholesale power markets. FERC determined, however, that the Transmission Tariff would only apply to wholesale transactions and certain "unbundled" retail sales not relevant to this case. Order No. 888 expressly excluded the transmission component of bundled retail service from the Transmission Tariff's reach.

Enron fails to acknowledge that FERC considered the reservation of jurisdiction over retail sales contained in Section 201 of the FPA, (16 U.S.C. § 824(b)) and that FERC rejected Enron's more expansive electric transmission regulation based on the Natural Gas Act (15 U.S.C. §§ 717 *et seq.*) ("NGA") and cases thereunder. Indeed, FERC determined that

> when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.

Order No. 888, FERC Stats. and Regs. at 31,781.

Thus by this Petition Enron seeks to establish exclusive federal authority over the transmission component of bundled retail electric service. The FPA and FERC's pronouncements in Order No. 888, do not authorize this position and Enron's arguments go well beyond the issues actually litigated below.

B. NSP's Transmission Tariff Revisions.

The pro forma tariff required by Order No. 888 provides for non-discriminatory curtailment of "point-to-point" transmission service during periods in which transmission congestion does not permit all firm transactions to continue simultaneously (*i.e.* when the physical capability of the lines and switching systems is potentially exceeded). In such circumstances "to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail

service to Network Customers and Transmission Customers taking Firm Point-to-Point Transmission Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers." (Order No. 888-A, Pro Forma Tariff at § 13.6.) (App. 315a.) In February 1998, NSP proposed to revise this provision. NSP wanted to incorporate application of regional reliability procedures that, among other things, provide for pro rata curtailments of point-to-point transactions without requiring utilities to interrupt bundled retail service. (App. 319a.) In the Curtailment Orders, FERC rejected NSP's amendments and then purported to compel the shedding of native load bundled retail service under the Transmission Tariff even if the wholesale customer (typically another utility) has other supply options and will not be forced to interrupt its bundled retail customers.

C. The Eighth Circuit's Decision.

In a carefully circumscribed opinion, the Eighth Circuit found that the Curtailment Orders improperly regulate NSP's State-jurisdictional retail service. FERC was without FPA authority to mandate less reliable service to native load customers than the retail customers of firm wholesale transmission users with other supply alternatives. *NSP*, 176 F.3d at 1094-95, citing *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996), *cert. denied sub nom. Indicated Expansion Shippers v. FERC*, 117 S. Ct. 1568 (1997) (hereinafter "*Altamont*"). This is a narrow, not sweeping, appellate result. [7] And subsequent FERC proceedings have followed or implemented the Eighth Circuit's interpretation. Thus the underlying factual issue that

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[7] FERC, Enron and others (including the Amici) sought rehearing and suggested en banc consideration before the Eighth Circuit. Notably, the National Association of Regulatory Utility Commissioners ("NARUC"), the umbrella organization for State utility regulatory commissions, filed an Amicus brief in opposition to Enron's. On September 1, 1999, the Eighth Circuit denied rehearing and declined to consider the matter en banc.

gave rise to this case is no longer live. Enron's and the Amici's cries about detrimental impacts on interstate commerce and wholesale competition simply cannot be taken seriously.

D. Subsequent Events.

The Curtailment Orders were remanded for further proceedings. FERC's Order on Remand (App. 44a), and NSP's subsequent notice filing (App. 321a) both implemented the Eighth Circuit's decision in light of other FERC rulings on transmission congestion management. On December 20, 1999, FERC accepted NSP's notice filing. *In re Northern States Power Co.*, 89 FERC ¶61, 299 (Dec. 20, 1999) (Enron Motion Appendix 1.)

More importantly, as discussed by Enron and the Amici, after the NSP-specific Curtailment Orders were issued, FERC separately and extensively considered curtailment issues under Order No. 888. These "generic" proceedings - initiated June 5, 1998, when the North American Electric Reliability Council ("NERC") filed its "Transmission Loading Relief" ("TLR") procedures, resulted in a series of "generally applicable" rulings on regional transmission congestion management (the " TLR Orders").[8] The Eighth Circuit determined that retail customers should be protected from *load shedding* when economic dispatch transactions of point-to-point customers are *curtailed*. This ruling is fully consistent with a FERC ruling just two days before the Eighth Circuit's decision. The May 12, 1998 TLR Order concluded

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[8] *North American Elec. Reliability Council*, Docket No. EL98-52-000, "Notice of Filing and Notice Regarding Implementation of NERC Transmission Loading Relief Procedures," (June 12, 1998); *North American Elec. Reliability Council* , 85 FERC ¶61,353 (1998), *reh'g denied*, 87 FERC ¶61,161 (1999); *North American Elec. Reliability Council*, 86 FERC ¶61,275 (1999); *North American Elec. Reliability Council*, 87 FERC ¶61,160 (1999); *North American Elec. Reliability Council*, 88 FERC ¶61,046 *order accepting compliance filing*, 89 FERC ¶61,031 (1999).

that curtailment and load shedding do *not* create comparable operational impacts and that all available alternatives should be exhausted before resorting to load shedding to relieve a transmission overload condition. 87 FERC at ¶ 61,161.

REASONS FOR DENYING CERTIORARI

The subsequent administrative proceedings obviate the presence of any substantial federal question that could possibly justify Supreme Court review of this case. S. Ct. Rule 10. The highly technical implementation issues surrounding Order No. 888 should remain before the agency with the requisite expertise. As evidenced by the TLR Orders, FERC has been resolving any remaining issues through individual or "generic" transmission adjudication proceedings. This Court and transmission access policy would be best served by rejecting Enron's collateral attacks on Order No. 888 and allowing FERC to proceed in developing that policy at the agency level.

To attract this Court's attention, Enron and the Amici distort NSP's initial FERC filing, the proceedings on remand, the scope of the Eighth Circuit opinion, and the potential impact of the opinion on Order No. 888. The Transmission Tariff amendments NSP proposed in February 1998 were *not* intended to "give a preference, in any curtailment, to [NSP's] own retail customers," or to "degrade the firm service" sold to third parties like Enron. (Pet. p. 3, 4.) Moreover, the Eighth Circuit never questioned the validity of Order No. 888 as that administrative order was not up for review in this case. To the contrary, the appellate decision was confined to technical implementation issues arising from the Curtailment Orders. *NSP*, 176 F.3d at 1093.

At its most fundamental level, the decision below is fully consistent with FERC's recent curtailment pronouncements. The TLR Orders are the correct operational and legal approach to wholesale transmission management. FERC's emerging regulatory scheme preserves *both* non-discriminatory/comparable access that wholesale users like

Enron seek *and* resolves lawfully the retail reliability concerns which caused NSP to initiate this case. The Curtailment Orders were not consistent with the TLR Orders or the Order on Remand. As such, the Curtailment Orders were properly reversed and remanded for further agency consideration.

And that is exactly what happened. As a result of the Eighth Circuit's decision, the retail service interruption aspects Curtailment Orders are a dead letter; the TLR Orders announce FERC's current policy on curtailment procedures. There is nothing left to be done by this court, least of all entertain Enron's patent collateral attack on Order No. 888.

A. Enron's Issues Are Not Appropriate ly Before This Court.

Enron and the Amici simply regurgitate issues that the Eighth Circuit considered and rejected. More importantly, these same arguments were pressed in the Order No. 888 administrative proceedings. Order No. 888 cashiered Enron's expansive view of transmission regulation, and FERC has never importuned such an approach in this case. Moreover, despite Enron's entreaties, Order No. 888 is not before the Court. If Supreme Court review of Order No. 888 and the pro forma tariff becomes necessary, the rulemaking appeal, now pending before the D.C. Circuit in *Transmission Access Policy Study Group v. FERC* , (D.C. Cir. No. 97-1715) (Oral Argument held Nov. 3, 1999), and not this case, will provide the proper vehicle.

1. Standard of Review

Enron's Petition seeks answers to questions that are far broader and entirely distinct from what the Eighth Circuit addressed. Enron's query "[w]hether FERC has jurisdiction under the [FPA] to regulate *all* transmission of electricity in interstate commerce" or whether it may " requir[e] that *any* curtailment of firm transmission service to wholesale customers be proportional" (Pet. p. i)(emphasis added) collaterally attack Order No. 888. By raising these issues,

Enron seeks to extend federal regulation of electric energy commerce far beyond what federal law and Order No. 888 provide.

FERC's jurisdiction to order pro rata curtailments of comparable jurisdictional transmissions under Order No. 888 was never disputed at the Eighth Circuit. Instead, NSP focused on Order No. 888's self-acknowledged limitation:

> [T]he Commission does not have jurisdiction over the transmission of ... power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities, and therefore the *pro forma* tariff does not have to be used for such transmission.

Order No. 888-A [62 Fed. Reg. 12,274 at 12,299] (footnote omitted).

Thus the Eighth Circuit's conclusion that FERC's jurisdiction does not encompass the transmission component of bundled retail service was correct. *NSP*, 176 F.3d at 1094. The Curtailment Orders never sought to expand Order No. 888's jurisdictional findings or to subject retail service to federal control. To the contrary, FERC conceded that "[t]he Commission does not regulate bundled retail sales." (App.43a.)

a. Enron End Runs Order No. 888.

Federal control over the transmission component of bundled retail service was presented to and rejected by FERC in the Order No. 888 proceedings. The Eighth Circuit (unlike Enron) recognized the "distinction between the rule-making proceedings pending before the United States Court of Appeals for the District of Columbia [Order Nos. 888 et al.] and the present petition for review in this case [of the Curtailment Orders.]" *NSP*, 176 F.3d at 1093.

> The proceedings in this petition for review relate to the proposed tariffs filed by NSP pursuant to Order No. 888. Involved are the differing interpretations of the Orders as they may affect the tariffs filed by NSP.

Id. at 1092. The timely filing of a petition for review of Order No. 888 in this case has long since passed. *See* 16 U.S.C. § 825l(requiring petition for review to be filed "within sixty days after the order of the Commission upon the application for rehearing").

Until the D.C. Circuit (and ultimately perhaps this Court) says otherwise, FERC, NSP and Enron are all bound by Order No. 888. The Curtailment Orders under review in this case were issued to implement one narrow aspect of Order No. 888 in a specific factual circumstance. The jurisdictional findings imbedded in Order No. 888 are highly relevant to the outcome of this case. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (*citing Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Further, a lower court or agency order is valid and enforceable until a Court of competent jurisdiction reverses. Today Order No. 888 stands as the law of the land, although aspects of that order are under review by the D.C. Circuit. Litigants are "expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980).

In sum, FERC in order No. 888 did not buy Enron's jurisdictional arguments. Instead, Order No. 888 recognized that federal regulatory jurisdiction is limited. The Curtailment Orders were issued pursuant to (and, as found by the Eighth Circuit, in violation of) Order No. 888. Thus this case is not about whether FERC's jurisdiction is limited as Order No. 888 provides – it is. Instead, the issue is where (not whether) the line between State and Federal jurisdiction exists. NSP and FERC agree that federal authority over the transmission of electricity is not unbounded. The Eighth Circuit merely

recognized the boundary drawn by FERC in Order No. 888 and concluded that the Curtailment Orders crossed that line. Enron should not be allowed to leverage this narrow holding into a fundamental jurisdictional challenge.

b. Enron Failed to Preserve the Issue.

Although Enron strives mightily to disguise the true nature of its collateral attack, the argument boils down to whether FERC was wrong in the Curtailment Orders because FERC was wrong in Order No. 888 when FERC recognized it had no jurisdiction over bundled retail sales. Before the agency in this case, however, Enron (who was a party) never sought rehearing of the Curtailment Orders on that basis. Thus the jurisdictional limitation of Order No. 888 is the controlling law of the case and Enron failed to contest *to FERC* in this case Order No. 888's jurisdictional reach. The FPA requires that

> [n]o objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

16 U.S.C. § 825l(b). Despite the Curtailment Orders' disclaimer of bundled retail sales regulatory authority (which is the heart of NSP's position) (App. 43a) Enron failed to seek rehearing or state a reasonable excuse for its failure to do so. Thus, Enron's petition asks this Court to consider an argument that was never urged on administrative rehearing.

This Court is without jurisdiction to entertain such requests. *See, e.g., Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985)(filing for rehearing within 30 days of the agency order is a jurisdictional prerequisite to judicial review); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-78 (1st Cir. 1978); *see also Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) (court precluded from hearing an objection to agency order where objection was not raised in administrative proceedings

as required by the statute); *Town of Norwood v. FERC*, 906 F.2d 772 (D.C. Cir. 1990) (dismissing petition for review because specific issue was not presented to FERC as required by Section 313(b) of the FPA). Enron, who neither sought rehearing of the Curtailment Orders nor properly attacked Order No. 888 in this proceeding, is barred from controverting the scope of FERC's jurisdiction before this Court.

2. There is No "Important Federal Question."

a. Supreme Court Rule 10.

Supreme Court rules and precedent do not welcome Enron's petition. Specifically, Rule 10(c) provides that certiorari may be granted when a "court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). But certiorari should not be granted

> except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

b. The Decision Below was Narrow.

Enron embroiders the Eighth Circuit's decision as "deny[ing] FERC a large part of its jurisdiction over the transmission in interstate commerce" or as "stri[pping] FERC of the authority to open the transmission grid fully to competition." (Pet. at 2-3; *see also* Enron Motion p. 2-3) Yet the lower court never suggested that Order No. 888 was invalid; the opinion was confined to the Curtailment Orders.

NSP, 176 F.3d at 1093. And NSP always acknowledged FERC's authority to mandate comparable treatment of jurisdictional third-party transactions. The Eighth Circuit merely confirmed this jurisdictional principle. Indeed, NSP even proposed to FERC (and FERC accepted) the requirement on NSP to redispatch[9] generation as a curtailment method for bundled retail service. FERC acknowledged "this [redispatch] procedure is reasonable and comports with the comparability requirements of the *pro forma* tariff." (App. 39a.)

Hence the only issue before the circuit court was whether bundled retail service could be interrupted by federal mandate even before other options for relieving the transmission congestion in a manner that preserved service to captive retail customers had been exhausted. Because retail load shedding has such a dramatic impact –lights out in factories, schools and homes – such a measure should be a last resort.

The FPA denied FERC regulatory authority "over facilities used in local distribution" and "any other sale" besides wholesale sales of electricity. 16 U.S.C. § 824(b). This statutory limitation creates the jurisdictional "bright line" which this Court recognized 35 years ago. *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) ("*Southern Cal. Edison Co.*") The Eighth Circuit's reaffirmation of FERC's self-acknowledged jurisdictional limit certainly does not contradict Supreme Court precedent or create irreconcilable conflicts among the circuits. Thus Enron's broodings about "interstate commerce" are beside the point and raise no weighty questions.

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[9] Redispatch occurs when energy output from generating station(s) on an unconstrained part of the interconnected system (with higher operating costs) is increased while output from (lower cost) station(s) contributing to the constraint is simultaneously reduced. Thus the congestion on the constrained line(s) is relieved while all customers continue to be served and the overall reliability of the system is protected.

3. The NERC TLR Proceedings and the TLR Orders

Almost immediately after the Curtailment Orders were issued, FERC embarked upon a comprehensive "generic" adjudication of curtailment protocols. These proceedings were convened to consider the inter-relationship between Order No. 888's "pro rata curtailment" requirements and the regional reliability practices adopted by NERC and its member reliability councils. FERC ultimately issued a series of clarifications, which implicitly modified several of the findings in the Curtailment Orders. Specifically the TLR Orders provided as follows:

- On Dec. 16, 1998, FERC determined regional curtailment procedures are consistent with or superior to the contract path method required in the Order No. 888 pro forma Tariff. FERC ordered all transmission utilities to use regional procedures. This was an operational departure from the requirements of the initial April 30, 1998 Curtailment Order. FERC did not, however, overrule the Curtailment Orders.

- Thereafter FERC required regional procedures to be filed with a utility's Transmission Tariff. NSP's current regional curtailment procedures were included in its Transmission Tariff in a compliance filing dated January 16, 1999. This filing was accepted by FERC.

- Most importantly, on May 12, 1999, just two days before the Eighth Circuit opinion, FERC expressly recognized the distinction between *curtailment* and *load shedding*, and specified that alternative curtailment methods should be employed prior to load shedding.[10]

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[10] This was precisely the type of clarification that NSP sought before the agency in this case, but which the June 29, 1998 and July 31, 1998 Curtailment Orders did not provide and indeed contradicted. Again FERC did not overrule the Curtailment Orders.

- A June 21, 1999, FERC order accepted regional curtailment procedures applicable to NSP's *region as* consistent with the Order No. 888 pro forma Tariff. FERC later accepted NSP's compliance filing.[11]

The TLR Orders implicitly modified on a generic basis FERC's interpretation of pro rata curtailment requirements while keeping the contrary rule of the NSP's specific Curtailment Orders in place. Once the record about these extraordinarily complex operational issues was more complete, FERC was able to fashion a regulatory strategy that protects wholesale competition while not impinging on retail reliability.[12] NSP strongly supports both the operational practices now embodied in the TLR Orders and the preservation of retail reliability policy expressed in the Eighth Circuit opinion.

Enron's and the Amici's worries about the supposed "havoc" this case will "wreak" on Order No. 888 (Pet. p. 24, *see also* Motion, pp. 2-3) simply do not withstand scrutiny. The TLR Orders and NSP's compliance filing in this case require all FERC-jurisdictional transmission providers in the Eastern Interconnection (including NSP) to implement curtailments on a pro rata basis under regional procedures which are designed to preserve reliability. The net result is

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[11] *Mid-Continent Area Power Pool*, 87 FERC ¶61,333 (1999); *see also NSP Operating Cos.*, Docket No. ER99-3465-000 (unpublished delegated letter order issued Aug. 3, 1999).

[12] The Amici's speculation (Amici Brief p. 14) about the TLR Orders being reopened if the Eighth Circuit opinion is upheld is simply that: speculation. The TLR Orders are the law now and transmission providers and FERC are "expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order," *GTE Sylvania, Inc.*, 445 U.S. at 386. In any event, the TLR Orders are not an issue in this proceeding. Any challenge to the TLR Orders would have to proceed through the normal processes of rehearing at FERC and, if necessary, review by a court of appeal.

that regulation of transmission system management is not *broken; there is nothing* for this Court to fix.

B. Enron's Collateral Attack On Order No. 888.

According to Enron and the Amici, the appellate opinion eviscerates Order No. 888 and emasculates FERC's ability to prescribe uniform transmission rules. However, Enron not only wants to undo the Eighth Circuit's decision, its Petition seeks to obliterate Order No. 888's well-crafted jurisdictional limits as well. This is a collateral attack on Order No. 888, which should be rejected.[13]

1. Standard of Review

An agency's construction of its enabling statute is entitled to great judicial deference. *Riverside Bayview Homes*, 474 U.S. at 131 (citing *Chemical Mfrs, Ass'n*, 470 U.S. at 125). In surveying the metes and bounds of agency jurisdiction, the Court should yield "to FERC's construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring)(*citing K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-292 (1988)); *Chevron U.S.A., Inc*, 467 U.S. at 842-844. "[T]his rule of deference applies to an agency's interpretation of a statute designed to confine its authority." *Id.*, (*citing Japan Whaling Ass'n v. American Cetacean Society*, 473 U.S. 221, 226, 233 (1986)); *Chemical Mfrs, Ass'n*, 470 U.S. at 123, 125-26; *see also Riverside Bayview Homes*, 474 U.S. at 131.

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[13] Enron's reliance on *United States v. Munsingwear Corp.*, 340 U.S. 36 (1950) (Pet. p. 13 Motion p.3) is just a smokescreen to take another bite at the certiorari apple and to further the collateral attack on Order No. 888. As stated long ago by Chief Justice Taft, however, certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

"In particular, it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-845 (1986); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n. 7 (1984) ("We have never ... held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review...; indeed, we have not hesitated to defer ..."); *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

2. Enron's Invented Regulatory Regime Has Already Been Rejected.

Enron proclaims that the Eighth Circuit started "with the erroneous premise that FERC lacks jurisdiction over interstate transmission of electricity for bundled retails sales." (Pet. at 18; *accord* Enron's Motion, p.2.) Enron would have FERC control all transmissions if a high voltage component is present. The nature of the electric service transaction, be it retail sale, wholesale point-to-point transaction, or wholesale sale would make no difference in the regulatory scheme that Enron champions. In other words the jurisdictional "bright line" would simply be erased. *See Southern Cal. Edison Co.*, 376 U.S. at 215.

Enron's argument is a non-starter because the so-called "erroneous premise" is fully consistent with the FPA's statutory mandate, Supreme Court precedent and administrative determination. Specifically, the FPA reserves to the States jurisdiction over the "local distribution" and retail sales of electricity. 16 U.S.C. §• 824(b). FERC has found the transmission of bundled retail service to constitute a component of retail sales that is beyond FERC's authority to regulate. Order No. 888, FERC Stats. and Regs., at 31,781. The FPA provides for concurrent federal and state jurisdiction

over electric utilities, with FERC controlling wholesale operations and the states overseeing retail sales.

Moreover, FERC acknowledged this dual jurisdiction and the non-federal nature of bundled retail service in the Order No. 888 rulemaking.

> [T]he Commission does not have jurisdiction over the transmission of ... power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities, and therefore the pro forma tariff does not have to be used for such transmission.

Order No. 888-A [62 Fed. Reg. at 12,299] (footnote omitted)(emphasis added). *See Federal Trade Comm'n v. Bunte Brothers*, 312 U.S. 349, 351-52 (1941)("that for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement . . . is not dependent on control over 'nonjurisdictional' transactions.") ("*Bunte*").

In sum there is no basis for recognizing the all-encompassing federal regulatory jurisdiction that Enron seeks to establish by its petition. Indeed, this precise argument was rejected by Order No. 888. In the order No. 888 rulemaking proceedings the Coalition for a Competitive Electric Market ("CCEM") (of which Enron is a member) urged federal authority over the transmission component of bundled retail electric service. CCEM argued "[t]he failure to unbundle transmission to retail customers is also squarely at odds with the Commission's decisional precedents under the Natural Gas Act." *Application of the Coalition For A Competitive Electric Market For Reconsideration And Clarification Or, In The Alternative, Rehearing*, FERC Docket No. RM95-8-001 (filed May 24, 1996). Rejecting CCEM's invitation to impose federal regulation upon direct retail sales, Order No. 888 explained FERC's jurisdictional limitations as follows:

> In response to those commenters (including NARUC) who argue that the Commission did not

> explain why its authority attaches only to unbundled, but not bundled, retail transmission in interstate commerce by public utilities, *we believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.* However, when a retail transaction is broken into two products that are sold separately ... we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled ... the resulting transmission transaction falls within the Federal sphere of regulation.

Order No. 888, FERC Stats. and Regs. at 31,781 (emphasis added).[14]

In short, Enron's federal regulatory expansion was spurned by FERC in Order No. 888 as well as by the Eighth Circuit below. And Enron, who is a party to the Order No. 888 appeal, recognizes that the issues it is championing here belong in the D. C. Circuit. In its statement of issues, Enron identified precisely its position that FERC should have taken far broader jurisdiction over transmission access than is reflected in Order No. 888. *Transmission Access Policy Study*

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[14] This specific jurisdictional finding is on appeal in the D.C. Circuit proceedings reviewing Order No. 888. NSP is not a party to that appeal because NSP supports FERC's fundamental Order No. 888 policy decisions. Enron, on the other hand, is participating in that appeal and has attacked FERC's jurisdiction directly in that proceeding as it is attacking FERC collaterally here.

Group, et al. v. FERC, Nos. 97-1715, et al., "Issue Statement and Disclosure Statement of Intervenor Enron Power Marketing, Inc., at 2 (D.C. Cir. filed June 18, 1998). Enron's direct attacks on Order No. 888 are properly addressed in that forum not as a collateral attack here.

3. Order No. 888 Rejected the Application of NGA Precedents.

Enron continues its collateral attack upon Order No. 888 by pressing the application of two NGA cases on the interpretation of the FPA. Enron insists that *Federal Power Comm'n v. Louisiana Power & Light Co* ., 406 U.S. 621 (1972)("*LP&L*") and *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992)("*MRT*") should control. *LP&L* and *MRT* addressed curtailment practices in the natural gas pipeline industry. According to Enron the same legal analysis should be applied to electric transmission service under the FPA and Order No. 888.

Enron, of course, presses this same argument in its direct attack on Order No. 888 in the D.C. Circuit. But Enron concedes (Pet. p. 10-11) that FERC never cited *LP&L* and *MRT*. Contrary to Enron's criticism, however, FERC did not "shy away" from these precedents. Rather, FERC tacitly disclaimed them because Order No. 888 rejected plenary jurisdiction over bundled retail transmissions. Congress decreed in the FPA that FERC's jurisdiction "shall not apply to any other sale of electric energy" such as retail sales. 16 U.S.C. § 824(b). See *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276 (1976)("*Conway*") ("[FERC] has no power to prescribe the rates for retail sales of power companies"). Obviously, Enron's lonely collateral attack, which contradicts even the agency's view below, cannot be seen as raising the type of important federal question justifying review.

FERC's more limited interpretation of its FPA jurisdiction is entirely reasonable. Unlike the FPA, the NGA invested FERC with exclusive jurisdiction over interstate gas

transportation regardless whether the traffic served retail or wholesale sales. The regulatory scope is different because gas production has historically been centralized. From the gas fields a federally regulated interstate pipeline network provides delivery to local distribution companies that are regulated by state commissions. The key to the natural gas business is getting the product to the customer bases, which in most cases are far removed from the production source. Interstate shipment was an essential part of the operation from the outset.

Electric service has far different roots, and those roots have jurisdictional significance. Unlike centralized gas collection and transportation systems, vertically integrated electric utilities started out as many "islands" of service. Numerous generation sources were located near the customer base. High voltage transmission was just the mechanism to transmit locally produced power to local customers. From the early days, retail distribution was considered local in character regardless of the voltage in the wires. Because they were *local* monopolies, state commissions regulated electric utilities. Slowly over time, these widely scattered "islands" were interconnected to form the present grid. This interconnected high-voltage delivery system ultimately gave rise to FERC jurisdiction over the wholesale transactions (sales and transmission service).

High voltage transmission began to take on the characteristics of a common carrier as power was shipped from state to state among various utilities. But right up to and including Order No. 888, bundled retail distribution service, regardless of voltage, continues to be governed by state and not federal tariffs.

> [W]e believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.

Order No. 888, FERC Stats and Regs at 31,781 (emphasis added).

FERC's refusal to rely upon *LP&L* implicitly acknowledges that Enron – without FERC's support - is trying to accomplish before this Court what Enron could not get in Order No. 888 – federalized regulation of all transmission, whether for wholesale or retail uses. Such litigation tactics contravene well-established law and distort the purpose of this Court's certiorari jurisdiction. FERC's interpretation of its FPA jurisdiction is entitled to judicial deference particularly when Order No. 888 is not the subject of this petition. *See Bunte*, 312 U.S. at 351-52. Enron should be told to press these arguments in the D.C. Circuit where they belong.

C. The Eighth Circuit's Opinion Follows The Relevant Precedent.

Enron conjures an alleged conflict with *Conway*, 426 U.S. 271. This illusory basis for certiorari jurisdiction is no more substantial than Enron's reliance upon *LP&L*, 406 U.S. 621.

Conway required FERC's predecessor to consider retail rates when establishing wholesale rates. This responsibility was imposed even though retail rates are not subject to federal jurisdiction. 426 U.S. at 281-82. While *Conway* addressed rate levels, by direct analogy, FERC must also consider the impact of federal transmission regulation on retail electric service reliability. As the Eighth Circuit recognized, this Court in *Conway* authorized FERC to consider non-jurisdictional matters in setting jurisdictional rates. It did not, however, authorize FERC to regulate non-jurisdictional activities. The Eighth Circuit correctly found that federally mandated load shedding would subject NSP retail customers to lower -- not comparable -- service levels than wholesale customers. The Eighth Circuit's decision, TLR Orders and the resulting compliance filings have now resolved this unacceptable situation.

Rather than creating a conflict among the circuits, the Eighth Circuit decision conformed itself to directly applicable precedent from the D.C. Circuit and elsewhere. *NSP*, 176 F.3d at 1094, citing *Altamont*, 92 F.3d at 1248. *Altamont*, like this case, holds that FERC may not encroach upon State-jurisdictional activities under the guise of regulating a FERC jurisdictional activity. 92 F.3d at 1248. This jurisdictional limitation was recently reaffirmed by the Tenth Circuit in *City of Fort Morgan v. FERC*, 181 F.3d 1155 (10th Cir. 1999)(holds that FERC overstepped jurisdictional bounds in extending authority over gas pipelines that were engaging in discrete nonjurisdictional activities); see also *American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997)("[T]he Commission must establish that the authority it proposes is rooted in a Congressional mandate."). The Eighth Circuit's holding was perfectly in line with all of these cases.

D. The Supremacy Clause Argument Fails.

Finally, Enron raises the spectre of the Supremacy Clause. U.S. Const. Art. VI, cl. 2. But the Supremacy Clause is invoked only when there is a *conflict* between state and federal regulatory schemes. The Constitution does not , as Enron suggests, deal a trump card to be played any time federal law is implicated. See *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 475 (1996). Claiming a conflict exists does not make it so. Thus, *Mississippi Power & Light Co.*, 487 U.S. 354 *and Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (Pet. p. 14) are easily distinguishable.

There is no conflict of sovereigns because the Curtailment Orders were not consistent with Order No. 888 or the subsequent TLR Orders. Supremacy Clause preemption must be narrowly tailored to avoid "running roughshod over the state interest" in matters of state concern. *Little Rock Family Planning Services*,, 516 U.S. at 476. The Eighth Circuit's decision is just such a result.

CONCLUSION

The reasons to reject Supreme Court review are legion. Statutorily established jurisdictional lines, the subsequent administrative resolution of the operational issue, and the correctness of the Eighth Circuit's decision merely head the list. Enron's Petition should be denied.

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No. 99-916

In the Supreme Court of the United States

ENRON POWER MARKETING, INC., PETITIONER

v.

NORTHERN STATES POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND ON PETITIONER'S SUGGESTION OF MOOTNESS AND MOTION TO VACATE

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the court of appeals should be vacated as moot.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND ON PETITIONER'S SUGGESTION OF MOOTNESS AND MOTION TO VACATE

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 176 F.3d 1090. The orders of the Federal Energy Regulatory Commission (Pet. App. 12a-43a) are reported at 83 F.E.R.C. ¶ 61,098, 83 F.E.R.C. ¶ 61,338, and 84 F.E.R.C. ¶ 61,128.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999, and amended on July 20, 1999. Petitions for rehearing were denied on September 1, 1999 (Pet. App. 281a-282a). The petition for a writ of certiorari was filed on November 30, 1999. Petitioner invokes the

Court's jurisdiction under 28 U.S.C. 1254(1). As discussed below, this Court now lacks jurisdiction to review the merits of petitioner's claim, because the case became moot while the petition was pending in this Court.

STATEMENT

1. The Federal Power Act (FPA or Act), 16 U.S.C. 792 *et seq.*, confers upon the Federal Energy Regulatory Commission (FERC or Commission) jurisdiction over all rates, terms and conditions of electric transmission service provided by public utilities in interstate commerce. Section 201(b)(1) of the FPA specifically extends the Commission's jurisdiction "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Jurisdiction over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce is left to the States. *Ibid.*

Pursuant to Section 205(c) of the Act, 16 U.S.C. 824d(c), public utilities subject to FERC's jurisdiction are required, "[u]nder such rules and regulations as the Commission may prescribe," to file tariff schedules showing their rates and service terms, along with related contracts for jurisdictional service. Section 206 of the Act, 16 U.S.C. 824e, prohibits such utilities from engaging in undue discrimination.

2. In recent years, the electric utility industry has been evolving from a traditional, heavily regulated industry dominated by vertically integrated monopolies into a competitive industry in which wholesale customers have choices as to their power suppliers. A key impediment to developing a competitive wholesale market for electric power is the monopoly ownership of

interstate transmission systems: a utility that controls access to transmission services can deny market access to competitors and favor its own generation in competing for buyers. FERC's efforts to address that problem underlie this and related cases.

a. In Order No. 888, currently on review in the District of Columbia Circuit,[1] the Commission found, on the basis of an extensive rulemaking record, that public utilities under its jurisdiction had engaged in undue discrimination by denying to others interstate transmission services that the utilities had provided themselves. The Commission undertook to end that discrimination. Order No. 888 thus requires public utilities to provide their transmission customers service comparable to what they provide themselves in using their own transmission systems to serve their own power customers. Invoking its authority under Sections 205 and 206 of the Act, 16 U.S.C. 824d, 824e, the Commission prescribed the terms and conditions of service necessary to accomplish that objective. Those terms and conditions are set out in a *pro forma* (*i.e.*, generally applicable) tariff.

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. Statutes. & Regs. ¶ 31,036, clarified, 76 F.E.R.C. ¶ 61,009 (1996), and 76 F.E.R.C. ¶ 61,347 (1996), modified, Order No. 888-A, 3 F.E.R.C. Statutes & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), petitions for review pending *sub nom. Transmission Access Policy Study Group* v. *FERC*, Nos. 97-1715, et al. (D.C. Cir. argued Nov. 3, 1999) (TAPSG). We have lodged with the Clerk of this Court a copy of FERC's brief in TAPSG.

Under the *pro forma* tariff, utilities must take transmission service for their own wholesale power sales and for certain retail power sales on the same rates, terms, and conditions they offer to others. Order No. 888, *supra*, at 31,746. All public utilities that own or control transmission facilities are required to file "open access" tariffs conforming to the *pro forma* tariff. A utility is permitted to file proposals to change its *pro forma* tariff provisions, provided that it demonstrates that the changes are consistent with, or superior to, the provisions of the *pro forma* tariff. *Id.* at 31,770; Order No. 888-A, *supra*, at 30,332.

b. Order No. 888 and its *pro forma* tariff set forth the rules under which public utilities that own, operate, or control interstate transmission facilities are to provide transmission service to all eligible transmission service buyers and sellers. As relevant here, the *pro forma* tariff specifies criteria for the "curtailment" of transmission service: *i.e.*, the "reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions." Order No. 888-A, *supra*, at 30,507-30,508. The *pro forma* tariff requires that curtailments be made

> on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-to-Point Transmission Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers.

Id. at 30,517.

In adopting this curtailment provision, the Commission addressed concerns that the requirements for nondiscriminatory curtailment would harm the transmitting utility's "native load" customers, *i.e.*, those customers, who may be wholesale customers or retail customers, to whom the utility sells power within its service territory and whose electric energy needs the utility has a regulatory or contractual obligation to meet. The Commission made clear that it was not requiring a *pro rata* curtailment of all transmission at the time of a constraint, but only those transactions that effectively relieve the constraint. Order No. 888-A, *supra*, at 30,278-30,279; Pet. App. 271a. Further, as to reliability for native load, the Commission stressed that the transmission provider would remain responsible for planning and maintaining sufficient transmission capacity and would be permitted to reserve that capacity to serve its native load safely and reliably while offering open access transmission to others under Order No. 888. Order No. 888-A, *supra*, at 30,279; Pet. App. 271a.

c. During the course of the Order No. 888 rulemaking, the Commission addressed several issues concerning the scope of its jurisdiction over interstate transmission in light of the Act's provisions giving the States jurisdiction over local distribution and retail sales of electric energy. Among those issues was whether federal authority extended to the interstate transmission component of an electric utility's sale of power to its retail customers. As the Commission recognized, a growing number of States are permitting or requiring utilities that provide retail service to "unbundle" their services so that customers can shop for power from sources other than their historical suppliers. Such unbundling, in turn, required the

Commission to determine which transmission facilities and services would be subject to Order No. 888's non-discriminatory tariff.

The Commission resolved that jurisdictional question as follows: If the interstate transmission service is provided separately and apart from the retail sale of electricity (*i.e.*, if it is "unbundled"), Section 201(b) gives the Commission, and not the States, jurisdiction over the interstate transmission service necessary to complete the sale. If, however, the transmission service is provided as part and parcel of the retail sale of electric energy (*i.e.*, if it is "bundled"), jurisdiction over the entire transaction, being a sale of energy made at retail, falls within the exclusive jurisdiction of the States. In each case, the States retain jurisdiction over the sale of energy and over local distribution. See FERC Br. in *TAPSG* 63-73.

d. Petitions seeking judicial review of various aspects of Order No. 888 were filed by representatives of virtually all segments of the electric utility industry. Those challenges were ultimately consolidated in the District of Columbia Circuit, where they are now pending. See note 1, *supra*. Among the issues raised in that appeal is the Commission's declaration that it has no jurisdiction over the interstate transmission component of bundled retail service. The curtailment provisions of Order No. 888 were not challenged.

3. In 1996, respondent Northern States Power Company (NSP), a public utility subject to the Commission's jurisdiction, filed a transmission tariff with the Commission to comply with Order No. 888. NSP's open access tariff filing incorporated the *pro rata* curtailment procedures specified in the *pro forma* tariff. In 1998, NSP made various filings under Section 205 of the Act, 16 U.S.C. 824d, proposing changes to its *pro*

forma open access transmission tariff. In particular, NSP sought to change the curtailment provisions of the tariff to establish a hierarchy under which some transmission customers would be curtailed before others.

The Commission rejected NSP's proposed curtailment provisions. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,098 (1998) (Pet. App. 12a-35a). The Commission explained that NSP had inadequately defined its proposed curtailment priorities and had failed to demonstrate that the proposed terms were consistent with, or superior to, the *pro forma* tariff terms required by Order No. 888. Pet. App. 23a-24a.

NSP then sought a declaration from the Commission that it would not be required to shed its native loads if, once NSP had exhausted all other options, there were still a need to reduce loads on facilities that were being used to serve both those native loads and NSP's third-party firm point-to-point transmission customers. The Commission denied that request. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,338 (1998) (Pet. App. 36a-41a). The Commission remained unpersuaded that it would be acceptable for NSP to curtail firm point-to-point transmission transactions without directing *pro rata* curtailments of transmission services for its native load. Pet. App. 40a. In other words, all firm transmission customers, whether native load or third-party, had to be treated comparably.

NSP then filed with the Commission an "emergency request for clarification, or rehearing and conditional motion for stay" of the orders. NSP claimed that the Commission lacked statutory jurisdiction to impose the curtailment provisions to the extent that they operated to override retail service obligations. NSP thus asked the Commission to clarify that its earlier orders rejecting NSP's tariff amendments should not be read to

apply the *pro forma* tarriff curtailment requirements to transmission service that NSP used to serve its bundled retail load.

In denying that last request, the Commission reiterated its earlier determination that, in providing service under the requirements of Order No. 888, NSP may not give preferential treatment to its native load when curtailing firm interstate transmission provided under the *pro forma* tariff. *Northern States Power Co.*, 84 F.E.R.C. ¶ 61,128, at 61,573 (1998) (Pet. App. 42a, 43a). While acknowledging that the FPA does not empower the Commission to regulate retail power sales, the Commission found no resulting jurisdictional problem, as the *pro forma* open access tariff implemented by Order No. 888 did no more than require that wholesale firm service transmission users be treated comparably to the transmission provider's native load customers, including retail customers. *Ibid.*

4. NSP petitioned for review of the Commission's orders. Agreeing with NSP, the Court of Appeals for the Eighth Circuit held that the Commission lacked jurisdiction to issue the orders under review.

The court first determined that this case involved a challenge not to Order No. 888 itself, but to the Commission's interpretation of Order No. 888 as applied to NSP's tariffs. Pet. App. 3a-4a.[2] The court then characterized the issue presented as "whether FERC may, through its tariff orders, require NSP, a public utility, to curtail electrical transmission to wholesale

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[2] The court rejected arguments that the petition should be dismissed as an improper collateral attack on Order No. 888, that the case should be transferred to the District of Columbia Circuit, and, alternatively, that the case should be held in abeyance pending the outcome of the omnibus appeal of Order No. 888 now before the D.C. Circuit. Pet. App. 3a-4a.

(point-to-point) customers on a comparable basis with its native/retail consumers when it experiences power constraints." Pet. App. 4a-5a. The court of appeals then accepted NSP's contention that, to the extent the Commission's orders obligated NSP to curtail its native/retail consumers on a *pro rata* basis with wholesale users, "NSP will be forced to provide interruptible service to its native/retail consumers" while the wholesale customer "has alternative sources from which to obtain continuous electrical supply." *Id.* at 6a.

The court then asked "whether FERC has the jurisdiction to affect the curtailment practices of NSP when dealing with NSP's native/retail consumers," and whether compliance with the Commission's "interpretation" of Order No. 888 would violate state regulatory laws. Pet. App. 6a, 9a. The Court assumed that when there is a curtailment of transmission service due to constraints, the interstate transmission customer would have alternatives while the retail customer would not—and that, despite contrary state requirements, the latter would be blacked out if not given a preference. *Id.* at 9a-10a. Based on that assumption, the court found that the Commission's orders "placed [NSP] between the proverbial rock and hard place" because, the court believed, NSP would have to act in violation of either a state requirement or Order No. 888. *Id.* at 10a.

Having thus found a conflict between state regulation of retail service and the Commission's regulation of interstate transmission, the court of appeals resolved the conflict in favor of state regulation. It reasoned:

> We think it obvious that the indirect effect of Order No. 888, as interpreted by the Commission, is an

> attempt to regulate curtailment of electrical power to NSP's native/retail consumers. Despite FERC's denial as to nonjurisdictional regulation, we find it has transgressed its Congressional authority which limits its jurisdiction to interstate transactions. As such, its attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC.

Pet. App. 11a. The court observed that the Commission had consistently and properly found in Order No. 888 that it had no jurisdiction to regulate retail sales. The court rejected the Commission's argument that, in the event of a clash between its curtailment requirement and state regulation, the federal regulation should prevail. The court reasoned that "the alleged discrimination [the Commission would prevent] is traceable to the nonjurisdictional sale of bundled service provided by NSP to the native/retail consumer rather than to the service provided to interstate customers." *Id.* at 7a-8a.

Subsequently, the court of appeals denied petitions for rehearing and suggestion of rehearing en banc filed by the Commission and others. Pet. App. 281a-282a.

5. On November 15, 1999, the Commission issued an order on remand to permit NSP's proposed curtailment procedures to go into effect. Pet. App. 44a-59a. In doing so, the Commission construed the court of appeals' order to address only "the implementation of curtailment over a transmission constraint after NSP has exhausted all of its network-native load generation redispatch options, and the firm point-to-point transmission customer whose firm service is being curtailed still has options with which to avoid having to shed

load." *Id.* at 48a; see also *id.* at 47a. The Commission directed NSP to file a new rate for transmission service to reflect the inferior quality of the service that would result from what would be non-*pro rata* curtailment. On November 19, 1999, NSP sought permission to withdraw its proposed tariff amendment, explaining that "actions taken by the Commission in other proceedings * * * have resolved the concerns that prompted the NSP requests for clarification and rehearing (and the resulting appeal)." *Id.* at 322a. On December 20, 1999, the Commission approved that request. Mot. to Vacate App. 1a-2a.

DISCUSSION

As petitioner observes (Mot. to Vacate 2), NSP's withdrawal of its tariff filing, combined with FERC's acceptance of that withdrawal, has rendered this case moot. Accordingly, the only question before this Court is whether to deny certiorari or, instead, to grant certiorari, vacate the judgment of the court of appeals, and remand the case with instructions to dismiss respondent NSP's petition for review of the prior Commission orders as moot. We agree with petitioner that the decision below is wrong, albeit on the narrower of the grounds petitioner advances. In our view, however, the petition nevertheless should be denied. The Solicitor General has long taken the position on behalf of the United States that when a case becomes moot after the court of appeals ruled, the Court should decline to vacate the decision below if the case would not have warranted review in the absence of mootness. In this case, the Commission in its order on remand construed the Eighth Circuit's holding to have a relatively narrow scope, notwithstanding the court's flawed reasoning. Consistent with that construction

and the longstanding position of the United States when a case has become moot and certiorari is not warranted, we believe that certiorari and the motion to vacate should be denied.

1. It is important at the outset to distinguish between two different categories of cases: those that become moot before a court of appeals has rendered its judgment or after this Court has granted certiorari, and those that become moot after a court of appeals has issued its judgment but before this Court has acted on any petition for certiorari. In the former category of cases, a litigant has a *right* to further review that should not be frustrated by the "vagaries of circumstance." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). This Court has accordingly explained that, "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below," *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam), so long as the mootness does not result from the voluntary act of the party seeking appellate review, see *U.S. Bancorp Mortgage*, 513 U.S. at 25-27. Similar principles govern vacatur of a court of appeals decision when a case becomes moot after this Court has granted a petition for a writ of certiorari. See *ibid.*

That rationale for vacatur does not apply, however, where the case becomes moot *after* the court of appeals has entered final judgment and while a petition for a writ of certiorari is pending. A losing party has no right to Supreme Court review, which is discretionary and exercised circumspectly. See Sup. Ct. R. 10. Mootness during the pendency of a certiorari petition does not provide a basis for vacatur if the case would not otherwise have warranted review by this Court. If

the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact. See Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 953-958 (1980). As a general rule, where the judgment would not otherwise have been reviewed by this Court, vacatur would disserve the public interest by eliminating a judicial precedent that our judicial system regards as "presumptively correct," see *U.S. Bancorp Mortgage*, 513 U.S. at 26, and would give the petitioner a windfall that it would not have received if the controversy had remained live.

Accordingly, the long-standing position of the United States has been that, when a case becomes moot while a petition for certiorari is pending, the petition should be denied if the case would not have warranted review on the merits. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900) (U.S. *Velsicol* Br.).[3] Although this Court has never expressly endorsed that standard, the Court has denied certiorari in a number of such cases (including *Velsicol* itself) and has thus decidedly not adopted a policy of automatically vacating the lower court decision whenever a case has become moot while a certiorari petition was pending. Cf. Mot. to Vacate 3

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[3] Accord U.S. Br. as Amicus Curiae Supporting Respondents at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) (per curiam) (No. 92-1123); Reply Br. at 6, *Keough* v. *American Policyholders Ins. Co.*, 510 U.S. 1040 (1994) (No. 93-320); U.S. Br. as Amicus Curiae Supporting Petitioner at 8-9 n.6, *U.S. Bancorp Mortgage Co., supra* (No. 93-714); U.S. Br. in Opp. at 10-14, *Cuban Am. Bar Ass'n* v. *Christopher*, 516 U.S. 913 (1995) (No. 95-84); U.S. Mem. in Opp. at 3 n.1, *Yankton Sioux Tribe* v. *United States*, 120 U.S. 322 (1999) (No. 99-34).

(suggesting otherwise). To the contrary, the Court "has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court will merely deny certiorari." Robert Stern et al., *Supreme Court Practice* 724 & n.29 (7th ed. 1993) (footnote omitted).[4]

2. Applying that rule here, we believe that the motion to vacate and the certiorari petition should be denied, because the decision below would not, in the end, have warranted review by this Court if the case had not become moot.

a. The analysis is somewhat complicated because we agree with petitioner that the decision below is incorrect. As an initial matter, the court of appeals erroneously assumed, without any record basis, that the Commission's orders created a federal-state conflict by forcing NSP to black out its retail customers to ensure service to its wholesale customers. Pet. App. 5a-6a. The Commission's orders, however, simply barred NSP from using its interstate electric transmission system to favor its own customers at the

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[4] Petitioner relies (Mot. to Vacate 3) on a passage in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), in which this Court stated that "[t]he established practice of the Court in dealing with a civil case * * * which has become moot while on its way [to the Supreme Court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. As discussed in the text, however, the Court's actual practice, at least in recent years, has been to the contrary in the circumstances presented here. And, in *U.S. Bancorp Mortgage*, this Court (albeit in a different context) "refus[ed] to be bound by [*Munsingwear*'s] dicta" concerning this Court's supposed "established practice." 513 U.S. at 23-24.

expense of the other customers to whom it provides firm interstate transmission service. In themselves, therefore, those orders did not unambiguously subject NSP to the conflicting state and federal obligations about which the court of appeals was concerned, and it was inappropriate for the court to vacate the Commission's orders on the theory that they might someday be applied to do so.

Moreover, the court erred in its narrow view of the Commission's statutory jurisdiction. Under the decisions of this Court and of the District of Columbia Circuit in *Conway Corp.* v. *FPC*, 510 F.2d 1264 (1975), aff'd, 426 U.S. 271 (1976), FERC has plenary authority to regulate transactions within its jurisdiction even when the exercise of that authority affects other transactions within the regulatory jurisdiction of the States. See 510 F.2d at 1271-1272; 426 U.S. at 272; see also *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 509 (1989); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); cf. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 375 n.4 (1986). We agree with petitioner (Pet. 18-19) that the decision below is difficult, if not impossible, to reconcile with that principle. FERC may validly take measures to ensure equal treatment for a utility's firm, jurisdictional transmission customers even if those measures may incidentally affect the terms on which the utility provides service to its retail customers.

There is no merit to the court of appeals' efforts to distinguish *Conway* on the ground that "the alleged discrimination is traceable to the nonjurisdictional sale of bundled service provided by NSP to the native/retail consumer rather than to the service provided to interstate customers." Pet. App. 7a-8a. By its terms, Order No. 888 focuses on interstate transmission

service solely under FERC's jurisdiction. In contrast, the principal case on which the court of appeals relied in attempting to distinguish *Conway—Altamont Gas Transmission Co.* v. *FERC*, 92 F.3d 1239 (D.C. Cir. 1996), cert. denied, 520 U.S. 1204 (1997)—involved a FERC-imposed condition in a pipeline certificate proceeding specifically requiring the pipeline's intrastate affiliate to change its state-regulated rates. *Altamont* is simply inapposite here, because FERC has made no attempt to exercise power over interstate service in a concerted effort "to induc[e] a change of state policy" in a matter explicitly reserved to the States. See *id.* at 1246-1248.

b. Even though we agree with petitioner that the decision below is incorrect, we did not file our own petition for a writ of certiorari to review the Eighth Circuit's decision. In fact, before the certiorari petition was filed by petitioner Enron, the Commission had concluded that the Eighth Circuit's decision could be narrowly construed and had issued the order on remand, described above (see pp. 10-11, *supra*), which embodied the Commission's narrow reading and application of the Eighth Circuit's decision. It was only then that respondent NSP sought to withdraw its proposed tariff. As those circumstances demonstrate, we believe that this case would not have been an appropriate vehicle for this Court's review even if it had not become moot.

Against this background, we are not prepared at this point to endorse petitioner's arguments about the practical significance of the decision below. Petitioner contends (Pet. 21-24) that the decision would threaten the Commission's efforts to remedy undue discrimination and protect the national supply of electricity, including its efforts under Order No. 888. But the court

focused narrowly on the jurisdictional consequences of the Commission's application of that order in rejecting NSP's tariff filings. Pet. App. 11a. In its order on remand, the Commission construed the court's decision to apply only in "narrowly circumscribed factual circumstance[s]" involving "the implementation of curtailment over a transmission constraint after [a utility] has exhausted all of its network/native load generation redispatch options, [where] the firm point-to-point transmission customer [whose firm service is being curtailed] still has options with which to avoid having to shed load." *Id.* at 47a; see also *id.* at 48a-49a, 321a-324a. Petitioner may disagree with the Commission's narrow interpretation of the court's decision, but any such disagreement would illustrate why, even if the case had not become moot, this Court would have benefited from further development of the law before granting review in this area.

Second, petitioner's principal, and broadest, jurisdictional argument (see Pet. 15-18), which the Commission rejected in Order No. 888, is pending before the D.C. Circuit on review of that Order. It is unlikely that this Court would have granted certiorari in this case to review the same argument while those parallel proceedings are pending.

Specifically, petitioner claims that, under *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), and *Mississippi River Transmission Corp.* v. *FERC*, 969 F.2d 1215 (D.C. Cir. 1992), the FPA's specific grant of authority over interstate transmission should be construed to authorize FERC "to regulate *all* interstate transmission of electricity, including the interstate transmission of electricity as part of a sale to retail customers"—and therefore to regulate curtailment even as to retail service. Pet. 14; see also Pet. 15-

18. In the proceedings culminating in Order No. 888, however, the Commission determined that its direct jurisdiction extends to interstate transmission service used for retail sales only if that service is unbundled from those sales. See Order No. 888-A, *supra*, at 30,226; FERC Br. in *TAPSG* 71-73. The Commission expressly disclaimed direct jurisdiction over a utility's interstate transmission where the utility provides its retail customers with power and transmission on a bundled basis, because (the Commission reasoned) transmission in those circumstances is part and parcel of a retail sale left to the jurisdiction of the States. *Ibid.*

Petitioner disagrees, and that disagreement is one of the issues before the District of Columbia Circuit on review of Order No. 888. Whatever may be the merit of petitioner's arguments on that point, however, *this* case, with its narrow focus, would not have been an appropriate vehicle for addressing those arguments even if the case had not become moot. That is especially so since one of petitioner's central arguments for seeking certiorari (see Pet. 15-18) was that the decision below conflicts with the District of Columbia Circuit's own decision in *Mississippi River*.

3. Petitioner correctly observes (Mot. to Vacate 4) that it "did not in any way cause or contribute to the mootness of this matter." As this Court held in *U.S. Bancorp Mortgage*, *supra*, a party's lack of responsibility for the mootness of an adverse court of appeals decision is often a necessary condition for any motion to vacate that decision as moot. But it does not follow that it is also a *sufficient* condition. Whatever their origin, the developments that make a case moot after the court of appeals has rendered its judgment should not ordinarily place the losing party (or a third party) in a *better* position than it would have occupied if those

developments had not arisen and the case had not become moot.

That, however, is essentially the result that petitioner seeks here. Under petitioner's approach, the post-judgment developments that made this case moot would entitle petitioner to vacatur of the judgment even though (as discussed above) we do not believe that certiorari would have been warranted if those developments had never occurred. Of course, if this Court disagrees with us on that point, then it should vacate the decision below. Indeed, because we agree with petitioner that the decision below is erroneous (albeit not on the more expansive of the grounds petitioner advances (see Pet. 15-18)), we have considerable sympathy for petitioner's desire to have the decision below vacated so as to eliminate any possibility that it will lead to the broadly adverse consequences petitioner fears—especially since it was respondent NSP's own withdrawal of its own proposed tariff that led to the mootness. But if this Court agrees with our assessment as to whether certiorari would have been warranted in the absence of mootness, the petition for a writ of certiorari, as well as the motion to vacate, should be denied.

CONCLUSION

The petition for certiorari and the motion to vacate should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and on Petitioner's Suggestion of Mootness and Motion to Vacate

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

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RULE 29.6 STATEMENT

Petitioner Enron Corp. incorporates by reference the Rule 29.6 Statement provided in its Petition for Writ of Certiorari filed on November 30, 1999.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and on Petitioner's Suggestion of Mootness and Motion to Vacate

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

The Solicitor General's brief in opposition agrees with petitioner Enron that the Eighth Circuit decision is "wrong" (FERC Br. in Opp. 11, 14, 15, 16, 19); that the court "erred in its narrow view of the Commission's statutory jurisdiction" over electric power transmission (*id.* 15); that NSP's subsequent voluntary withdrawal of its tariff mooted the case (*id.* 11, 18); that petitioner did not cause the mootness (*id.* 18); and that if the Court agrees with petitioner that certiorari would have been warranted, the Court "should vacate the decision below." (*Id.* 19).

While the Solicitor General expresses "considerable sympathy for petitioner's desire to have the decision below vacated so as to eliminate any possibility that it will lead to the broadly adverse consequences petitioner fears" (*id.*), he nevertheless argues that the decision is not certworthy because FERC itself attempted a heroic "limiting construction" rather than seek review (*see id.* 16-17) and therefore vacatur is inappropriate. In fact, the decision is both important and otherwise certworthy, and vacatur is warranted.

Importance. The Solicitor General's position as to the significance of this case contrasts sharply with the position stated—after petitioner's prior filings in this Court and after the case was mooted by NSP—by both the Secretary of Energy and the Chairman of FERC. Both have written to Congress. Each noted that the Eighth Circuit ruled that FERC is powerless to protect interstate wholesale transmissions of power against discrimination in favor of bundled retail sales, and each stressed the precedential importance of that decision.

On January 11, 2000, Energy Secretary Richardson wrote to Chairman Bliley of the House Committee on Commerce, commenting on H.R. 2944, a pending bill that would change aspects of electric power regulation. He warned that the rule announced by the Eighth Circuit in this case would "balkanize" regulation with a "chaotic impact on the development of competitive markets":

> In *Northern States Power Co. v. FERC*, 176 F.3d 1090 (1999), the Eighth Circuit Court of Appeals held that FERC was essentially powerless to prevent a utility from using its ownership of transmission facilities that are used for bundled retail sales to favor its own retail customers over wholesale transmission customers. H.R. 2944 adopts the Eighth Circuit's line of reasoning, by explicitly providing

> that States, and not FERC, have sole jurisdiction over the transmission component of bundled retail sales.
>
> This provision is troubling. The regulation of transmission would essentially be balkanized, which could have a potentially chaotic impact on the development of competitive markets. FERC would be unable to prevent a utility providing bundled transmission services from gaining a competitive advantage over other electricity suppliers.[1]

Earlier, on December 23, 1999, FERC Chairman James J. Hoecker also wrote to Chairman Bliley criticizing H.R. 2944 for failing to correct the serious jurisdictional problems created by the Eighth Circuit's decision.

> H.R. 2944 fails to adequately address the jurisdictional problem evidenced by the Eighth Circuit's recent holding in *Northern States Power Co. v. FERC, (NSP)*, 176 F.3d 1090 (8th Cir. 1999). If the *NSP* case were to be interpreted and applied broadly, the Commission would be prevented from ensuring that interstate transmission services are provided without preference to any group of transmission users, such as the retail loads of any particular state, leading to balkanization of the national interstate transmission grid.[2]

The appendix to Chairman Hoecker's letter elaborates on the damaging effects of the decision below:

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[1] Letter from Bill Richardson, U.S. Secretary of Energy, to Tom Bliley, Chairman, House Committee on Commerce, U.S. House of Representatives, at 3 (Jan. 11, 2000); Appendix at 4a. The letters of Secretary Richardson and Chairman Hoecker are reprinted in full in the attached Appendix.

[2] Letter from James J. Hoecker, Chairman, FERC, to Tom Bliley, Chairman, House Committee on Commerce, U.S. House of Representatives, at 3 (Dec. 23, 1999); Appendix at 13a.

> [A] recent court decision has raised concerns about the Commission's ability to ensure non-discriminatory transmission service. The appellate court decision in *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *(NSP)*, if interpreted and applied broadly, may allow the States to establish preferential terms and conditions for the bundled transmission services they regulate compared to the terms and conditions available to other transmission users. This would interfere with interstate commerce in electricity. While the Commission does not construe *NSP* this broadly, others may so argue and, in fact, have already begun doing so.[3]

FERC is sufficiently troubled by the Eighth Circuit decision to suggest legislative overruling. But there is a simpler solution than allowing the continued validity of the decision to affect the legislative process: vacatur on grounds of mootness, in accordance with this Court's established procedures.

Certworthiness. The Solicitor General has advised this Court that FERC "is not prepared at this point to endorse petitioner's arguments about the practical significance of the decision below" (FERC Br. in Opp. 16). His explanation is that FERC itself "had concluded that the Eighth Circuit's decision *could be* narrowly construed" (*id.* (emphasis added)) and, rather than seek review in this Court, FERC decided to try to narrow the decision in an administrative order FERC issued after remand.[4]

But the Solicitor General and FERC cannot whistle quite so easily past this particular graveyard. FERC Chairman Hoecker told Congress that the Eighth Circuit

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[3] Appendix at 18a.

[4] FERC's Order after remand was of course itself never subject to review, because NSP chose instead to withdraw its tariff and moot the case.

decision can be "interpreted and applied broadly" and that others "have already begun doing so." *See supra* p. 4. Chairman Hoecker's fears are justified: the central premise of the Eighth Circuit decision was that the curtailment practices FERC prescribed in Order No. 888 and imposed on NSP here conflict with state regulatory power—and that state power wins. The court said, "NSP, through FERC's interpretation, . . . will in effect be in violation of either a state tariff or Order No. 888." (Pet. App. 10a.) It therefore ordered FERC to amend its orders "so as not to encroach upon the regulatory authority of the states." (Pet. App. 11a).

As the Solicitor General acknowledges (FERC Br. in Opp. 15), the decision "is difficult, if not impossible, to reconcile with [the] principle" laid down by the D.C. Circuit and this Court in *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271, 272 (1976). Those decisions, as interpreted by the Solicitor General, hold that FERC "has plenary authority to regulate transactions within its jurisdiction even when the exercise of that authority affects other transactions within the regulatory jurisdiction of the States." (FERC Br. in Opp. 15). The Solicitor General sees "no merit to the court of appeals efforts to distinguish *Conway*." *Id.*[5]

The Solicitor General's brave attempt to limit the Eighth Circuit's decision to the facts of this case does not work. Although the case itself involved a particular "curtailment" policy, the decision below does not in any way *turn*

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[5] NSP argues that *Conway* holds only that FERC may "consider" price discrimination that indirectly affects services subject to FERC jurisdiction, but not that FERC may do anything about such discrimination. The Solicitor General correctly rejects this attempt to distinguish *Conway* because the key point is the same in both that case and this one: FERC may require that the jurisdictional rates not be set at levels that are unfair to the customers being charged those rates. *See Conway*, 426 U.S. 271, 272.

on aspects of that policy or other particular facts. It rests on the Eighth Circuit's belief, contrary to *Conway*, that FERC lacks power to protect jurisdictional interstate transmissions against discrimination in favor of retail customers. *See, e.g.*, Pet. App. 9a. The Eighth Circuit has thus rendered a decision that conflicts with decisions of this Court and the D.C. Circuit on a point of broad importance. The decision is binding on petitioner, FERC, and all other parties in the large area covered by the Eighth Circuit and has been cited to Congress and other courts. The decision would have warranted this Court's review on the merits had the case not been rendered moot, and it should be vacated now.[6]

Petitioner also made a separate argument, both below and in its petition in this Court, that FERC has direct jurisdiction over interstate transmission even when it is part of a bundled retail service, as this Court squarely held with respect to natural gas transmission in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The Eighth Circuit decision cannot be squared with *Louisiana Power & Light*, and with the D.C. Circuit's decision in

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[6] NSP tries to portray Enron's position as attacking FERC's Order No. 888, NSP Br. in Opp. 6, 10-11. To the contrary, FERC's administrative ruling was *against* NSP, rejecting its tariff as not conforming to Order No. 888. In its petition to the Eighth Circuit for review, NSP argued that FERC lacked jurisdiction to prevent discrimination, a contention irreconcilable with the entirety of Order No. 888. Enron, and FERC both opposed this contention, citing *Conway*. The Eighth Circuit agreed with NSP and rejected the FERC/Enron position.

NSP's suggestion (Br. 12) that "this Court is without jurisdiction" because Enron failed to seek rehearing before FERC is another attempt to confuse the issue. Enron's position, supporting rejection of NSP's tariff, had prevailed in the FERC administrative proceedings and there was no need or obligation to "seek rehearing." The position taken by both FERC and Enron below assumed the validity of Order 888 and was in no sense a "collateral attack."

Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215 (D.C. Cir. 1992). This conflict alone would have warranted review of the Eighth Circuit's decision by this Court, if this case were not moot.

FERC did not agree with Enron below on this point (nor did it agree in *Louisiana Power & Light* that it had parallel jurisdiction under the Natural Gas Act, but this Court told FERC that it did). FERC's brief in this Court argues that certiorari and vacatur are not warranted on this issue because the *Louisiana Power & Light* question has been raised and might be reached on the petitions for review of Order No. 888 that are pending before the D.C. Circuit. But the issue is one of many in that complex proceeding; there is no reason to assume that the D.C. Circuit will reach it. Moreover, the present question is not whether this Court should take up the issue on the merits in this case, but rather whether to vacate an unreviewable decision on a clearly important question. FERC's discussion of which case *would have been* a better vehicle if this case were not moot is therefore at best highly theoretical. The most practical course here, clearly, would be to vacate the Eighth Circuit decision so that the D.C. Circuit does not have to take that decision (and the possibility of a circuit conflict) needlessly into account in whatever it does.

In any event, the certworthiness of this case does not depend on the *Louisiana Power and Light* issue (i.e., whether FERC has jurisdiction over all interstate transmission of electricity). FERC and Enron agree that the Eighth Circuit erroneously decided the *Conway* issue (i.e., whether FERC can protect concededly jurisdictional transmissions against discrimination in favor of other transmissions). That issue is not before the D.C. Circuit. It should have been resolved by this Court in this case, had mootness not intervened.

The Munsingwear Doctrine. Petitioner believes that this case satisfies the suggested requirement, advanced by the United States but never expressly endorsed by this Court, that a decision must be independently certworthy before it may be vacated in accordance with *United States v. Munsingwear*, 340 U.S. 36 (1950). Petitioner also respectfully suggests that the Court need not wear such narrow and theoretical blinders as the Solicitor General is advocating in this case. The decision below is important, seriously wrong in the view of both petitioner and FERC, in conflict with decisions of this Court and other Circuits, potentially very mischievous in relation to future decisions in the Eighth Circuit and other Circuits and Congress, and now moot. Under those circumstances the Court does not in fact need to wrestle, on a wholly hypothetical basis, with questions like whether some other case might have provided a better vehicle to correct the error, or whether the Court should devote its own limited resources to a merits review. On the contrary, in a case like this one, vacatur is the most efficient way to leave the merits for future consideration: "The requirement that the Court undertake a hypothetical disposition of the petition would impose an unwarranted burden." Wright, Miller & Cooper, 13A Federal Practice and Procedure: Jurisdiction 2d § 3533.10, at 433 (1984).

CONCLUSION

For the reasons set forth above and in Enron's petition for writ of certiorari, the writ should be granted and the Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SECRETARY OF ENERGY
Washington, DC 20585

January 11, 2000

The Honorable Tom Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D. C. 20515-6115

Dear Mr. Chairman:

Thank you for the letter you sent to the Department of Energy and other Federal agencies on November 30, 1999, requesting our analysis of H.R. 2944, the Electricity Competition and Reliability Act, as reported by the Subcommittee on Energy and Power. This response will provide the Administration's views on the bill.

It is crucial that the 106th Congress act on comprehensive electric restructuring legislation. As the States move forward with their individual retail competition programs, the absence of Federal legislation is creating significant uncertainty in regional power and transmission markets. This lack of certainty is having a direct impact on the reliability and efficiency of electric markets in both States that have adopted restructuring proposals and those that have not. If congressional action is further delayed, market participants will continue to be unable to plan adequately. State regulators and the Federal Energy Regulatory Commission (FERC) will remain without sufficient direction as to their appropriate regulatory roles, and the reliability of our electric grid may be endangered.

The Administration appreciates the courtesy shown us by Chairman Barton and the other members of the Subcommittee on Energy and Power as it considered restructuring legislation. The Subcommittee's process was open and fair and was conducted in good faith. Nevertheless, the legislation reported by the Subcommittee, H.R. 2944, fails to include many of the provisions necessary to promote more reliable, efficient and competitive markets and cannot be supported by the Administration in its current form. The remainder of this letter outlines our most serious objections.

Regional Transmission Organizations

Actual and perceived discriminatory conduct by transmission providers favoring their own power or power sold by an affiliate remains a significant impediment to the development of competitive markets. Potential participants may be inhibited from entering markets, and partilcularly from building new generation, if they believe that generators affiliated with transmission owners have an unfair advantage. Discriminatory treatment can also impair reliability because market participants may be reluctant to share information with transmission providers affiliated with competitors.

The Administration believes that truly independent regional transmission organizations (RTOs) are an effective remedy for this problem. RTOs can help promote more reliable, efficient and competitive power markets by eliminating a transmission-owning utility's ability to discriminate against competing power marketers and by removing many of the inefficiencies associated with the transmission of power across lines owned and operated by numerous entities.

H.R. 2944, while encouraging RTOs, relies on incentives and voluntary formation. We are concerned that some

transmission-owning utilities might be reluctant to give up the benefits they enjoy under the status quo in order to join an RTO. If some utilities decline to participate in an RTO or if different utilities in the same region join separate RTOs, many of the benefits associated with RTOs will be lost. FERC needs to have the authority to require RTO participation in order to promote the development of RTOs that are sensible in both structure and geographic scope.

H.R. 2944 also denies FERC the authority to require any change in an existing RTO, regardless of whether the organization meets the bill's standards or is the most effective organization for a particular region. This provision effectively removes a siginficant portion of the transmission system from FERC jurisdiction and fails to subject all transmission organizations to the same rules.

To be effective and unbiased, an RTO must be independent of all market participants. If the RTO is controlled by one or more market participants, it will have an incentive to favor its affiliates. Although H.R. 2944 nominally requires independence, it does not prohibit the affiliates of market participants from controlling an RTO. Control by an affiliate could equally compromise the RTO's independence. At the very least, there would continue to be the perception of discriminatory conduct.

The Administration is also concerned that the incentive pricing provisions in H.R. 2944 designed to encourage transmission-owning utilities to participate in an RTO may be ill-conceived. Certainly, any conditions that impede utility participation in RTOs need to be eliminated. However, it is important to recognize that, at least for the foreseeable future, transmission will continue to be a monopoly function. Transmission-owning utilities should not be permitted to recover an unjust amount at the ex-

pense of consumers. Likewise, it is counterintuitive to extend these incentives to pre-existing RTOs. The Commission may very well be in the position of allowing an existing RTO to increase rates without achieving any added value for consumers.

Bundled Transmission Services

H.R. 2944 would also makes it difficult for FERC to prevent a transmission-owning utility from engaging in discriminatory practices if the utility's transmission services are bundled with its generation and distribution activities. In *Northern States Power Co. v. FERC*, 176 F.3d 1090 (1999), the Eighth Circuit Court of Appeals held that FERC was essentially powerless to prevent a utility from using its ownership of transmission facilities that are used for bundled retail sales to favor its own retail customers over wholesale transmission customers. H.R. 2944 adopts the Eighth Circuit's line of reasoning, by explicitly providing that States, and not FERC, have sole jurisdiction over the transmission component of bundled retail sales.

This provision is troubling. The regulation of transmission would essentially be balkanized, which could have a potentially chaotic impact on the development of competitive markets. FERC would be unable to prevent a utility providing bundled transmission services from gaining a competitive advantage over other electricity suppliers. State regulators, which would have jurisdiction, may not have sufficient incentives to adequately police a utility's use of its transmission lines, especially if a competing supplier were seeking access to sell power to consumers located in another State.

Market Power

We are also disappointed that H.R. 2944 fails to address the issue of horizontal market power. Even if access to

transmission is sufficiently open, utilities with significant control over generation may be able to raise prices above competitive levels while inhibiting the entry of new market participants. The exercise of market power has the potential to cut, or even eliminate, the substantial savings to consumers that would otherwise result from competition in the wholesale and retail marketplaces.

Evidence from the United Kingdom, which recently restructured its electricity markets, is illuminating. The two companies operating coal-fired generating units were able to engage in strategic bidding behavior that raised prices above competitive levels—perhaps by as much as 25%—despite the entry of new participants in the market.

Because utilities have legally acquired their current monopoly status and control over generation under a previous regulatory regime, existing Federal law is inadequate to address this problem. Restructuring legislation should grant FERC the authority to remedy horizontal market power in wholesale markets. In addition, FERC should have the authority to mitigate retail market power if a State regulatory agency so requests.

Utility Mergers

We can expect that, as industry restructuring continues, the pace of mergers will continue to accelerate. While some mergers can produce economies and efficiencies for both utilities and consumers, it is important that FERC be able to ensure that mergers not inhibit the trend towards competitive markets.

H.R. 2944 requires FERC to act on a utility merger application within 180 days. If no action is taken in this time period, the merger is deemed automatically approved. Although it is important that merger reviews proceed on a timely basis, we are concerned that the deadline in-

cluded in the bill unreasonably restricts FERC's ability to review complex utility mergers. Utilities would have an incentive to delay the review process in the hope that the Commission could not meet the deadline.

In addition, H.R. 2944 fails to address the gaps that currently exist with regard to FERC's ability to review certain types of mergers pursuant to the Federal Power Act, Mergers between generation-only companies and utility holding companies can have a significant impact on a power marketer's ability to stunt the development of competitive markets. FERC's current authority over these transactions is uncertain. The Administration's proposed legislation provides FERC with authority to regulate these types of mergers as well.

Role of State Restructuring Programs

The Administration believes that it is appropriate for the States to take the lead on issues associated with the transition to retail competition. However, it is important to recognize that the Federal Government continues to have an important role to play in enhancing the reliability, efficiency, and competitiveness of interstate markets. Unfortunately, H.R. 2944 undermines this essential Federal role by prohibiting the application of the provisions of the bill where States adopt conflicting provisions as part of a retail competition plan, even if the plan is adopted as long as three years following the enactment of the bill. Federal restructuring legislation cannot succeed if the States are able to preempt the Federal role, regardless of the impact such preemption may have on interstate commerce.

Environmental Protection and Other Public Benefits

Although we recognize that H.R. 2944 includes a title on environmental protection, the bill does not go far enough

in addressing potential impacts on the environment. As both the President and the Vice President have stated on numerous occasions, and as is supported by the Supporting Analysis for the Comprehensive Electricity Competition Act published by the Department of Energy (May, 1999), economic growth and environmental protection need not be mutually exclusive. The Administration's legislation appropriately incorporates measures to protect the environment, including a renewables portfolio standard and a public benefits fund.

While competition has the potential to increase renewable energy's share of the electricity market, the inherent uncertainties associated with the transition to competition, the recognition of important environmental and energy diversification benefits from renewables, and the fact that existing Public Utility Regulatory Policies Act requirements are incompatible with competition and ineffective under present market conditions suggest that Federal policy towards renewable electricity should be revisited in the context of restructuring legislation.

H.R. 2944 provides inadequate incentives for the development of this important technology. We believe the adoption of a renewable portfolio standard provides more appropriate signals to support renewable energy investment decisions than the expansion of the Renewable Energy Production Incentive that is proposed in H.R. 2944.

In addition, we are concerned that the bill fails to provide support for other important public benefits programs. Under cost-of-service regulation, programs supporting and promoting research and development, energy efficiency and low-income assistance were supported, in part, through utility rate structures. As utilities prepare for competition, they will be unwilling to include in their rates the cost of programs not included in the rates of their

competitors. A public benefits fund, which provides matching grants to States for low-income assistance, energy efficiency programs, consumer education and the development and demonstration of emerging, clean technologies, should alleviate these concerns. The Administration's proposal also authorizes a rural safety net and other provisions designed to assure that Native Americans and persons living in rural areas share fully in the benefits associated with restructuring.

Federal Utilities

The Administration is pleased that H.R. 2944 includes provisions designed to enhance the opportunities for competition in the regions served by the Federal Power Marketing Administrations (PMAs) and the Tennessee Valley Authority (TVA). The bill adopts many of the changes proposed in our legislation, the Comprehensive Electricity Competition Act. We are concerned, however, that the provisions of H.R. 2944 which apply the antitrust laws to the PMAs may, at a minimum, need to be modified to ensure that the PMA activities currently permitted by statute are not inadvertently repealed.

Target Date/Opt-Out

While the Administration agrees with the premise of H.R. 2944 that States should take the lead in implementing retail competition programs, we continue to believe that there is substantial merit to establishing a target date for the implementation of retail competition and requiring State utility commissions and non-regulated municipal and cooperative utilities to hold proceedings to examine the benefits or costs of adopting retail competition programs. Most, if not all, State utility commissions and non-regulated utilities would likely determine that competition would benefit consumers in their jurisdictions after a thorough examination.

Federal Electricity Purchases

Like all consumers, the Federal Government expects to reduce its electricity bill in a competitive marketplace, thereby achieving savings for the Federal taxpayer. H.R. 2944, however, may allow utilities to discriminate against the Federal Government, in its role as consumer. The bill divests FERC of jurisdiction over all cases involving the Federal Government in which the Government received electric service as of July 1, 1999, under a retail tariff. This provision would deny Federal taxpayers the benefits of competitive markets. Moreover, its purpose is to resolve a pending legal dispute between the Department of Energy and a private utility. This legal dispute should be resolved in the proper forum; it should not be settled by a retroactive change in the law because a utility company may be nervous about its prospects for success under the current statutory language.

Mr. Chairman, the Administration appreciates this opportunity to comment on H.R. 2944 and look forward to working with you and other members of the Committee to enact comprehensive electricity restructuring legislation that promotes reliable, efficient, and competitive markets.

Yours sincerely,

/s/ Bill Richardson
BILL RICHARDSON

cc: The Honorable John D. Dingell
Ranking Minority Member

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION
Washington, DC 20426

Office of the Chairman December 23, 1999

The Honorable Tom Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of November 30, 1999, requesting my views on H.R. 2944 as reported by the Energy and Power Subcommittee of the House Commerce Committee. You note that the goal of legislation should be a seamless national market for electricity. I am pleased to have the opportunity to offer my personal views on the bill, particularly in light of the Commission's strong and continuing efforts to promote competitive and seamless bulk power markets.

Overall, I believe the current version of H.R. 2944 represents an unfortunate retreat from the goal of a competitive, efficient, and transparent wholesale power market, a goal that would be much better served by adoption of H.R. 2050 or H.R. 1828. In fact, H.R. 2944 moves in a direction that is contrary, not only to Commission policy, but to economic and operational developments in the marketplace itself. The growing significance of the interstate bulk power trade, new technologies, the entry of new participants in the market, and the arrival of futures contracts and e-commerce offer great potential benefits to consumers. However, the benefits that these changes bring to the energy economy can be thwarted by ineffi-

cient grid operations or by parochial and discriminatory practices by transmission owners. That is why the Commission is pursuing the development of regional markets and fair and open transmission access so vigorously. Competition will not survive in a balkanized environment with conflicting market rules, congestion, barriers to entry, vertically integrated utilities and, most importantly, declining reliability. Competition and monopoly power are simply incompatible.

The challenges we face in ensuring fair, efficient and reliable operation of the transmission grid and promoting truly competitive bulk power markets are fundamentally issues of interstate commerce. These are precisely the kinds of matters that the Federal Power Act and the Commission were created to solve. In fact, I believe that solutions at the federal (*i.e.*, interstate) level are now more necessary than ever before given the development of wholesale markets. States, of course, will continue to have a critical regulatory role. The vast majority of electricity transactions are retail—matters appropriately handled by our state courterparts. Retail consumers in all states, however, will benefit from open and competitive wholesale markets, regardless of whether they are allowed to participate directly in that competitive environment or whether their traditional utility providers participate in it on their behalf. H.R. 2944, in my view, both misses key opportunities to advance competition in interstate bulk power markets and, in some important respects, would set back the development of such competitive markets.

Not all the news is bad, I hasten to add. H.R. 2944 makes a positive contribution in these areas:

- Section 102 ratifies the Commission's open access rules (Order No. 888) and also places transmis-

sion service of public power entities, rural electric cooperatives, and Federal utilities under the Commission's jurisdiction.

- Section 103(a) endorses the Commission's view that Regional Transmission Organizations (RTOs) will improve interstate transmission and the reliability of bulk power markets.

- Section 201 establishes electric reliability organizations to develop enforceable reliability standards, subject to Commission review.

While I am heartened by these provisions, I find H.R. 2944 otherwise disappointing. To be as specific as possible, I submit with this letter two analyses in appendix form. One details the policy and legal issues raised by major provisions of H.R. 2944. The second provides specific language for revising the bill on these and other issues.

Let me summarize my principal problems with the bill:

- The bill leaves RTO participation entirely to the discretion of each utility. This arguably diminishes current authority under the Federal Power Act to take certain actions to cure undue discrimination in the provision of service by transmission-owning utilities, and leaves the Commission without tools to provide for RTO participation by public or cooperatively-owned transmitting utilities.

- The bill precludes the Commission from developing the standards that RTOs must meet, relying instead on limited statutory standards. The Commission's recent RTO Final Rule, Order No.

2000,[1] employs more elaborate and demanding standards, based on an extensive record developed in that proceeding.

- H.R. 2944 fails to adequately address the jurisdictional problem evidenced by the Eighth Circuit's recent holding in *Northern States Power Co. v. FERC* (*NSP*) 176 F.3d 1090 (8th Cir. 1999). If the *NSP* case were to be interpreted and applied broadly, the Commission would be prevented from ensuring that interstate transmission services are provided without preference to any group of transmission users, such as the retail loads of any particular state, leading to balkanization of the national interstate transmission grid.

- The bill allows States to exempt themselves from the requirements of H.R. 2944 during a three year period following enactment. This provision invites States to take actions that would further balkanize the Nation's transmission grid, and is not necessary to protect state prerogatives in regulating retail markets.

- The bill fails to extend Federal Power Act review to mergers involving only generation facilities, and requires the Commission to act on all merger applications within 180 days after the filing date. While the Commission typically acts within this time frame, a few complex mergers must be set for hearing, and it would be unfortunate if the Commission were forced to reject mergers simply because time ran out before the Applicant could demonstrate at such a hearing that disputes should be resolved in its favor.

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[1] The Commission issued Order No. 2000 on December 20, 1999 (*see* http://www.ferc.fed.us/newsl/rules/pages/rulemake.htm).

- The bill does not include explicit authority to address market power in wholesale markets through market power mitigation. If we cannot ensure fair competition, there will be no hope for light-handed regulation.

The appendices to this letter contain substantive support for my views, as well as recommended modifications to H.R. 2944 on other important issues. In that connection, I repeat my offer to you, Chairman Barton, and all members of the full Committee to furnish any technical support that may be needed to craft a sound legislative approach. I do believe that Congress should act to provide direction for the restructuring of this important industry. I also believe that the timing is propitious, especially with respect to RTOs and reliability. It is critical, however, that any federal legislation not perpetuate market inefficiency or balkanize the operation of the transmission grid. Flawed legislation will deny the American public the benefits of moving from vertically integrated monopolies to competition.

I hope that this information is helpful to you. If I can be of any further assistance in this or any other Commission matter, please let me know.

Sincerely,

/s/ James J. Hoecker
JAMES J. HOECKER
Chairman

Enclosures

Appendix A
Substantive Analysis of Major Issues

I. *Regional Transmission Organizations*

Section 103 of H.R. 2944 addresses regional transmission organizations (RTOs). Section 103(a) finds that RTOs "will improve the transmission of electric energy in interstate commerce and the reliability of the bulk-power system." The Commission shares this view on the value of RTOs to electricity consumers. However, I believe the provisions of section 103, as currently drafted, are inadequate to advance RTO formation, and in some respects are counter-productive.

First, H.R. 2944 leaves the decision to form or join an RTO in the sole discretion of transmission owners. I do not support this approach. While the Commission is taking a voluntary approach to formation of RTOs at this time, I do not believe transmission owners should be given discretion to stand as an obstacle to the benefits of RTOs indefinitely. As H.R. 2944 finds, RTOs "will improve the transmission of electric energy in interstate commerce and the reliability of the bulk-power system." I believe the benefits of RTOs also include: (1) removing remaining opportunities for discriminatory transmission practices; (2) improved market performance; and (3) facilitating necessary grid expansions. I interpret the FPA to allow the Commission to require public utilities to form or join RTOs when necessary to mitigate market power or remedy undue discrimination or anticompetitive effects. H.R. 2944 should be modified to reinforce, not undermine, this existing authority.

Second, participation in RTOs by all transmission-owning utilities, including non-public utilities, is likely to be critical to the success of RTOs. H.R. 2944 would au-

thorize the federal transmitting utilities to participate in RTOs, but would not authorize the Commission to require RTO participation by these or other non-public utilities. These utilities control significant portions of the interstate transmission grid. The Commission's authority to require formation of or participation in RTOs should extend to all transmitting utilities.

Third, H.R. 2944 appears to allow the Commission only to approve or disapprove an RTO application under Section 202(h), but not to modify it. To ensure that RTOs yield their expected benefits as soon as possible, and consistent with the Commission's authorities and practices under other FPA sections, such as sections 203, 205 and 206, the Commission should have the procedural flexibility to work with the applicants to modify a flawed proposal, instead of simply disapproving a deficient or non-complying application and thereby imposing the burden of repeated reapplication.

Fourth, H.R. 2944 states that the Commission "shall approve" an RTO application if it meets certain standards specified in the statute. Although the topics of the standards—independence, geographic scope and configuration, operational authority and expansion—are generally consistent with some of the key considerations identified in the Commission's Final Rule on RTOs, the bill would not appear to allow the Commission to specify additional standards that an Applicant must meet in order to obtain Commission approval. For example, the Commission's RTO rule requires an RTO to be responsible for short-term reliability and carry out other functions necessary for an independent and efficient RTO. I do not support legislation that would preclude the Commission from adopting additional requirements for obtaining RTO approval when such requirements are necessary to ensure

that the RTO provides reliable, efficient and nondiscriminatory transmission service.

In addition, I do not support legislation that codifies detailed prescriptions for each of the standards that an RTO must meet. Competitive markets will continue to evolve in ways that are difficult to predict. The Commission as well as the institutions we regulate need the ability to adapt to changing market conditions and to changing regional needs.

One aspect of H.R. 2944's RTO standards is particularly troublesome. The independence provision states that ownership of passive, non-voting interests, or ownership of five percent or less of the voting interests in an RTO, shall be "deemed" not to confer control over the RTO. This provision appears to create a statutory definition of independence that cannot be rebutted even where specific circumstances indicate that passive ownership by an individual market participant and/or its affiliates, or active ownership by market participants, could inappropriately influence the decisions of the RTO to the disadvantage of other market participants.

II. *Undue Discrimination and Comparability*

Section 101 of H.R. 2944 provides Commission jurisdiction over transmission used for unbundled retail sales, and gives the States authority over transmission used for bundled retail sales. I believe codification of FPA jurisdiction of unbundled transmission is appropriate, but that jurisdiction over bundled transmission must be reexamined.

Explicit codification of the Commission's jurisdiction over transmission used for unbundled retail sales is appropriate. This codification will settle an issue that is already the subject of litigation on appeal of Order No.

888 and will prevent future litigation in other cases that may raise the same issue. This codification also will ensure that all unbundled transmission is provided on a comparable basis and avoid balkanization of markets that could result from different transmission rules established by each State.

However, codification of State jurisdiction over bundled retail transmission is problematic. While the Commission accepted State jurisdiction over bundled retail transmission in its Order No. 888, interstate markets for electricity have grown substantially since then, and historical distinctions between retail and wholesale transmission have become obsolete. In addition, a recent court decision has raised concerns about the Commission's ability to ensure non-discriminatory transmission service. The appellate court decision in *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), (*NSP*), if interpreted and applied broadly, may allow the States to establish preferential terms and conditions for the bundled transmission services they regulate compared to the terms and conditions available to other transmission users. This would interfere with interstate commerce in electricity. While the Commission does not construe *NSP* this broadly, others may so argue and, in fact, have already begun doing so. In light of this court decision, codifying State jurisdiction over bundled retail transmission will result in unnecessary litigation and uncertainty and could lead to undue discrimination in transmission services.

Section 902 of H.R. 2944 would require the Commission to study whether State regulation of the transmission component of bundled retail sales results in unduly discriminatory transmission services and to submit a report to Congress, making recommendations on amendments to Federal law. Resolution of this important issue should not be deferred. The problem of balkanized transmission

services must be addressed now to avoid stifling competition in bulk power markets. As the Commission found in its Final Rule on RTOs, competition in these markets requires regionalization of access to transmission services. Market participants, now more than ever, are looking to the Commission to exercise authority over all transmission, to ensure non-discriminatory access to the grid. Allowing 48 different sets of rules for access to transmission services will discourage or prevent wholesale sellers from entering many markets, and will impede an efficient marketplace.

The simplest solution, and the solution most likely to ensure the development of full competition in interstate markets for electricity, is not to codify State jurisdiction over bundled retail transmission and instead to expressly extend FPA jurisdiction over all transmission, including what is now called bundled transmission. This approach would preclude preferences for bundled transmission services and prevent the balkanization of transmission access. This approach is not inconsistent with respecting the States' role in regulating retail markets. I support federal jurisdiction over bundled retail transmission only to ensure the continued growth of competition in interstate bulk power markets by preventing balkanization of transmission access and unnecessary litigation and uncertainty. Federal jurisdiction over bundled retail transmission would not infringe on State or local siting authority or interfere with States regulating retail sales adequately.

An alternative approach that addresses the *NSP* issue more narrowly is to add to the FPA a specific provision (*see* Appendix B) clarifying the Commission's preemptive authority to ensure that transmission services within its exclusive jurisdiction are provided on a basis that is comparable to, *i.e.*, no less favorable than, other transmission services provided by a transmitting utility. This second

approach, however, is likely to result in more litigation than my first suggestion, because disputes about discrimination by individual States will need to be resolved case-by-case. The costs of this litigation also may discourage sellers from entering certain markets, thus diminishing competition.

III. *Existing State Programs*

Section 107(b) of H.R. 2944 provides as follows:

> Nothing in this Act [H.R. 2944] nor any amendment to the Federal Power Act made by this Act preempts, overrides, or requires any change in the terms of any State retail access plan enacted, adopted, approved, promulgated or ordered prior to or within three years after the date of the enactment of this Act to the extent that such plan addresses matters within the jurisdiction of the State prior to the enactment of this Act.

The effect of this provision is difficult to predict. The provision takes the unusual step of "grandfathering" *future* actions by States. This provision could allow States to exempt themselves and in-state utilities permanently from various sections of H.R. 2944, including possibly the reliability section and the section subjecting municipal and cooperative utilities to open access transmission service. It also could allow States to adopt provisions or conditions inconsistent with the Act.

I recommend deleting this provision to avoid further balkanization of power markets. The statutory scheme of the FPA is based on the need for federal regulation of interstate commerce. As power markets have become increasingly regional in recent years, market participants have recognized the need for, and advocated, consistent transmission rules without regard to corporate and State

boundary lines. The Commission's Final Rule on RTOs is an effort to adapt transmission rules to these commercial changes. Section 107(b) would allow States to intrude on the federal responsibility for regulating interstate transmission and contravene the procompetitive regionalization of power markets by preserving, and even inviting, 48 different regimes for interstate electricity markets.

Importantly, federal regulation of interstate power markets is fully compatible with allowing States to decide whether and how to adopt retail competition. The Commission has accommodated diverse State efforts to implement retail competition, and has not impeded any such efforts. The Commission also has not interfered in any way with the decisions of those States that have *not* authorized retail competition. Thus, section 107(b) is not needed for the purpose of preserving State autonomy. Instead, it creates risks that regulatory balkanization will undermine the procompetitive goals of H.R. 2944.

IV. *Mergers*

Under FPA section 203, the Commission must review proposed mergers, acquisitions, and dispositions of jurisdictional facilities by public utilities, and must approve such transactions if they are consistent with the public interest. In evaluating the public interest, the Commission considers a transaction's effects on competition, rates, and regulation.

The Commission's jurisdiction over mergers is currently limited in certain ways. First, the Commission has no direct jurisdiction over transfers of generation facilities. It can review transactions involving a public utility only when they involve other facilities that are jurisdictional (such as transmission facilities or contracts for wholesale sales). Second, the Commission lacks direct jurisdiction over mergers of public utility holding companies that have

electric utility subsidiaries. While the Commission has construed such mergers to involve jurisdictional indirect mergers of public utility subsidiaries of the holding companies, or changes *in* control over the jurisdictional facilities of the public utility subsidiaries, the FPA is not explicit on this point.

Section 401 of H.R. 2944 leaves existing FPA Section 203 intact, except for the addition of a provision which requires the Commission to act on a proposed application within 180 days after the date of filing. I believe that H.R. 2944 should clarify that the Commission has jurisdiction over transactions involving only generation facilities and mergers of holding companies. I also believe the 180-day provision is unnecessary and detrimental. The Commission already processes most mergers within this time limit but must take more time for the few mergers requiring evidentiary hearings. Section 401 may prevent the Commission from providing adequate due process and developing an adequate evidentiary record to analyze competitive effects. Alternatively, the Commission may be forced to reject mergers if applicants do not have enough time to meet their burden of establishing an evidentiary record demonstrating that factual disputes should be resolved in their favor. I recommend deleting section 401.

V. *Market Power*

An important issue that deserves serious consideration by the Congress, and that is not addressed in H.R. 2944, is the need for additional regulatory tools to address market power problems. Without such tools, we risk losing the foundation necessary to support deregulated generation markets. Based on the Commission's experience with rapidly changing markets and corporate realignment, I now believe that the Commission needs enhanced remedial authorities if we are to achieve and maintain competitive power markets.

Bulk power markets are changing rapidly, as the Commission and many States continue to promote competition and move away from requiring cost-based power sales. The Commission's Final Rule on RTOs is a major step toward addressing the remaining obstacles to competition in bulk power markets. However, market power still exists. The Commission can prevent enhancement of market power when transactions require authorization under FPA section 203, but this remedy does not address preexisting market power. The Commission also can deny or revoke authorization for market-based wholesale rates, but this approach forces a return to cost-based rates, a result that does little or nothing to promote competition. Moreover, market participants are increasingly seeking the Commission's authorization for mechanisms such as regional power exchanges, and these mechanisms cannot develop properly if the Commission's only tool for addressing market power issues is to require cost-based rates. In order to accommodate, and indeed foster, the growth of these regional markets, the Commission needs ample tools for addressing market power.

Other pending legislation would enhance the Commission's authority to address market power outside the context of mergers. For example, the Administration's proposed bill, H.R. 1828, would allow the Commission to address market power in retail markets, if asked to do so by a state lacking adequate authority to address the problem. This authority is consistent with the Commission's policy of addressing a merger's effect on retail competition when states request Commission action and cite their own lack of authority. The Administration's bill would also give the Commission explicit authority to address market power in wholesale markets by requiring a public utility to file and implement a market power mitigation plan. H.R. 2050, which Congressmen Markey and Largent have sponsored, also contains provisions that would

allow mitigation of market power, to the benefit of competition and consumers. As the Commission moves toward light-handed regulation of rates, terms and conditions of power sales, its ability to monitor the market and to identify and address exercises of market power becomes more important. The Commission should have more flexibility in dealing with market power problems. I strongly believe the Commission needs this additional authority to ensure that competition benefits all consumers.